Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Salim Ahmed Hamdan, a citizen of Yemen who is currently detained at Guantanamo Bay.

The Respondents here and in the United States Court of Appeals for the District of Columbia are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Mr. Salim Hamdan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 2005 WL 1653046. The opinion of the district court (App. 20a-49a) is reported at 344 F. Supp. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

The relevant constitutional, statutory, and international law provisions involved are set forth in Appendix D, *infra*.

STATEMENT

In the immediate wake of the treacherous violence committed against the United States, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224 (Sept. 18, 2001) (AUMF). Under the AUMF, the United States commenced armed conflict in Afghanistan in October, 2001.

The next month, despite the limited scope of the AUMF, the President issued a Military Order to authorize military commission trials. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Commission rules are starkly different than the fundamental protections mandated by Congress in the Uniform Code of Military Justice (UCMJ). *See, e.g.*, Military Order No.1, 68 Fed. Reg. 39374-01 (July 1, 2003). They allow the accused to be excluded from portions of his trial, *id.* § 6(B)(3); permit the admission of unsworn

statements in lieu of testimony, *id.* § 6(D); and vest the Secretary of Defense with the judicial power to rule in matters that terminate the proceedings, *id.* § 6 (H)(1)-(6). The rules even state that the limited protections provided to defendants, such as not being forced to testify and the presumption of innocence, are not "right[s]" that are in any way "enforceable", *id.* § 10, and warn that these protections, such as they are, can be withdrawn at any time. *Id.* § 11.

1. Almost four years ago, Petitioner Hamdan was captured by indigenous forces while attempting to flee Afghanistan and return his family to Yemen. After being turned over to American forces, he was taken in June 2002 to Guantanamo Bay Naval Base, where he was placed with the general detainee population at Camp Delta. App. 78a. In July 2003, the President found that Petitioner was eligible for trial by commission. Accordingly, he was placed in solitary confinement from December 2003 until late October 2004 (four days before this case was argued in the District Court).

2. In December 2003, pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a plea, Lieutenant Commander Swift was detailed to serve as Mr. Hamdan's military counsel. Mr. Hamdan first met Swift on January 30, 2004. Twelve days later, Mr. Hamdan filed a demand for charges and a speedy trial under UCMJ Article 10. That demand was rejected in a legal opinion claiming that Petitioner was not protected by the UCMJ. In July, 2004, eight months after the start of his solitary detention, he was charged with a single count of conspiracy that allegedly began in 1995. App. 63a-67a.

3. On April 6, 2004, a Petition for Mandamus or, in the Alternative, Habeas Corpus, was filed in the United States District Court for the Western District of Washington. In light of the Court's decision in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), the case was transferred to the United States District Court for the District of Columbia in August, 2004.

On November 8, 2004, following oral argument, the district court (Robertson, J.) granted the petition in part and denied Respondents' motion to dismiss. The court rejected

Respondents' argument to abstain from the merits until after the trial. Abstention was not appropriate because Mr. Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" App. 24a (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

The district court then ruled that commissions may be used only to hear offenses that are triable under the laws of war, including the Geneva Conventions; that the Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) (GPW) is judicially enforceable; and that, as long as his prisoner-of-war (POW) status is in doubt, Petitioner must be tried by court-martial. *Id.* 25a-37a. The court found that the Military Order did not satisfy either the GPW or the UCMJ, particularly as it deprived Petitioner of the right to attend his trial and hear the evidence presented against him. *Id.* 37a-47a. For the President to stray from the UCMJ placed him in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). App. 28a.

4. On November 16, 2004, the government filed a notice of appeal and a Motion for Expedited Appeal. The court of appeals expedited the case the next day.[1]

5. On July 15, 2005, following oral argument, the court of appeals reversed the district court in an opinion written by Judge Randolph and joined by Judge Roberts (in full) and Judge Williams (in part).[2] It first rejected Respondents' claim that abstention was appropriate, finding that *Ex parte Quirin*, 317 U.S. 1 (1942) "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." App. 3a. Rationales for *Councilman* abstention, comity and

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[1] On November 22, 2004, Mr. Hamdan filed a petition for certiorari before judgment. *Hamdan v. Rumsfeld*, No. 04-702. The Court denied the Petition on January 18, 2005.

[2] Twenty amicus briefs were filed in Mr. Hamdan's case, including briefs from retired American Generals and Admirals, hundreds of European and U.K. Parliament members, dozens of law-of-war experts, and several nongovernmental organizations. These briefs are available at http://www.law.georgetown.edu/faculty/nkk/publications.html#h.

speed, "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." *Id.*

The court also held that Petitioner's challenges fell within an abstention exception because "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction. *See Abney v. United States*, 431 U.S. 651, 662 (1977)." App. 4a. Because Mr. Hamdan "contend[s] that a military commission has no jurisdiction over him and that any trial must be by court-martial," the court did not abstain and fully reached the merits of his claims. *Id.*

The court then held that Congress authorized commissions in the AUMF. It found further authorization in 10 U.S.C. 821, which states that the UCMJ does not "deprive military commissions . . . of concurrent jurisdiction" to try war crimes, and 10 U.S.C. 836, which permits the President to prescribe some procedures for military trials. *Id.* 5a-7a.

The court of appeals next rejected the district court's holding that the Geneva Conventions constrain Hamdan's trial. It found that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) precluded the GPW's judicial enforcement. Acknowledging that *Eisentrager* involved only the 1929 Convention and that it reached the question in an "alternative holding," the court opined that the GPW is not substantively different. *Id.* 7a-9a.

With respect to Common Article 3 of the Convention, which prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as essential by a civilized people," the court deferred to the President's interpretation that the conflict with al Qaeda is international and therefore exempt. *Id.* 12a.

The court rejected the district court's conclusion that provisions in the UCMJ, such as 10 U.S.C. 839, which requires an accused's presence at all stages of his trial, apply.

Judge Williams concurred, disagreeing with the court's treatment of Common Article 3 because "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." App. 16a-18a.

REASONS FOR GRANTING THE PETITION

Two Terms ago, a plurality of this Court warned that "a state of war is not a blank check for the President." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). The court of appeals, by rejecting longstanding constitutional, international-law, and statutory constraints on military commissions, has given the President that power in tribunals that impose life imprisonment and death. Its decision vests the President with the ability to circumvent the federal courts and time-tested limits on the Executive. No decision, by any court, in the wake of the September 11, 2001 attacks has gone this far.

This Court has always closely scrutinized the Executive's use of commissions, recognizing that any encroachment on the jurisdiction of civilian courts by military tribunals poses momentous questions in a Republic committed to the rule of law and to separation of powers. As *Ex parte Milligan* put it, "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people." 71 U.S. (4 Wall.) 2, 118-19 (1866). That this case involves the first commission since World War II, and the first since the enactment of the UCMJ and the GPW, makes certiorari particularly appropriate.

Despite these intervening statutes and treaties, the court of appeals largely based its ruling on this Court's *Eisentrager* decision, accepting the President's claim of power to convene a commission to try most any offense, against any offender (including a United States citizen or nationals of any country in the world), in any place (including the United States). The President was allowed that power not for a fixed time, such as a war declared against a specific nation-state, but rather for perpetuity against an amorphous enemy that could include nationals of every country in the world. In these tribunals, the President was given the power to disregard not only American common-law and military law, but international law--despite the fact that the *raison d'être* of commissions is to enforce international law.

The decision below expands the powers of the President beyond those recognized in *Ex parte Quirin*, 317 U.S. 1 (1942). Unlike that World War II case, whose parameters were fixed by the Court's declaration that its opinion was limited "only" to the "particular acts" of the saboteurs and "the conceded facts," *id.*, at 46, the court of appeals' decision has no limits at all. Canonical cases that restrict presidential action, including *Ex parte Milligan*, *supra*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the latter decided *after Quirin*, went completely *unmentioned* by the court below.

The ruling below enables hundreds of terrorism cases prosecuted by the Justice Department to be tried by commission. It is not plausible to think that the AUMF handed such sweeping power to the President by permitting *force*. Force includes authorization to *detain* prospectively, but does not by itself comprise adjudication to look *retrospectively* at questions of guilt and innocence. *Hamdi*, 124 S. Ct. at 2682 (Thomas, J., dissenting) ("[T]he Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan....[T]he punishment-nonpunishment distinction harmonizes all of the precedent").

To interpret "force" more broadly, the court of appeals not only had to resuscitate two precedents of this Court that have not been invoked to conduct commissions in a half-century, *Quirin* and *Eisentrager*; the court also had to extend them radically. In those cases, Congress had declared a war against a fixed enemy with a definite end in sight. And the commission rules in place did not depart from fundamental principles of military law and the laws of war, and were employed against admitted unlawful combatants.

None of those limits exist under the court of appeals' sweeping holding in this case. As the district court held, an emblematic example of the break with our country's traditions is the denial of Mr. Hamdan's right to be present at his own trial. Respondents have offered *no* instance, either civilian or military, in our nation's 229-year history where trial procedures were specifically engineered to force a non-disruptive defendant to be excluded from his trial. This is

not speculative; petitioner has already been excluded from his trial. Despite weighty state secrets at issue in *Quirin*, the saboteurs were always present at their trial. In Iraq, under rules written by the U.S. Department of Defense, Saddam Hussein and his henchmen will be present, despite much classified material in play there. As the district court found, the right to be present is universal, echoed in pronouncements of the Court, international law, and UCMJ.

Indeed, while claiming that commissions are "commonlaw war courts," App. 15a, the court failed to apply *any* common-law constraints, not even the longstanding guarantee of confrontation, which is "founded on natural justice." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoting *State v. Webb*, 2 N.C. 103, 104 (1794)).

The court also misread *Eisentrager* to strip Article III courts of their constitutional and statutory power and duty to use the Great Writ. Its decision is in deep tension with other circuits, several of which have enforced treaty-based rights under the habeas corpus statute. The case for enforcement in this case is even stronger since 10 U.S.C. 821 expressly requires that commissions act in conformity with the laws of war. That statute, like 10 U.S.C. 836, must be read consistently with international law, for "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

In the end, the court of appeals held that the President has the power to decide how a detainee is classified (as protected by the GPW or not), how he is treated, what criminal process he will face, what rights he will have, who will judge him, how he will be judged, upon what crimes he will be sentenced, and how the sentence will be carried out. The President is entitled to "pas[s] sentences and...carr[y] out...executions" through commissions, even if they do not "affor[d] all the judicial guarantees which are recognized as indispensable by a civilized people." GPW Art. 3. Under the panel's ruling, the determination that the President made to disregard this GPW provision is *unreviewable* by courts.

This reversal of the district court cannot be correct. The Revolution was fought to ensure that no man, or branch of government, could be so powerful. In a system of checks and balances, there can never be a time when the rule of law does not circumscribe power as fundamental as adjudicating culpability and punishment. Our forefathers paid a heavy price in blood to establish these principles, and it is our duty to defend them from all threats, foreign or domestic.

Limited precedents like *Quirin* and *Eisentrager* simply cannot serve as full frameworks for the legal war on terror, yet the Solicitor General routinely cites them as such.[3] As the past four years have shown, too many doubts–both international and domestic–have been generated by excessive reliance on these decisions.

Petitioner asks simply for a trial that comports with this nation's traditions, Constitution, and commitment to the laws of war, such as a court-martial under 10 U.S.C. 818 (authorizing courts martial to try law-of-war violations).

It will be some years before another military commission challenge reaches this Court again, and significant damage to the fabric of American law will ensue in the interim if the court of appeals' ruling is left undisturbed.

I. THE COURT OF APPEALS' DECISION FULLY RESOLVED SEVERAL ISSUES, EACH OF WHICH IS APPROPRIATE FOR CERTIORARI, AND ITS RESOLUTION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court of appeals vastly expanded Presidential power. Far from the battlefield–however broadly defined–and remote from any military occupation, the President convened commissions without explicit statutory authority,

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[3] *See, e.g.*, Petr. Br., *Rumsfeld v. Padilla*, No. 03-1027, at 6; Resp. Br., *Hamdi v. Rumsfeld*, No. 03-6696, at 6; Resp. Br., *Rasul v. Bush and Al Odah v. Bush*, Nos. 03-334 and 03-343, at 4; Petr., *Bush v. Gherebi*, No. 03-1245, at 12; Br. Opp., *Hamdan v. Rumsfeld*, No. 04-702, at 10; Resp. Br., *Loving v. United States*, No. 94-1966, at *16; U.S.Br., *United States v. Moussaoui*, No. 03-4792, 2003 WL 22519704 at *25 (4th Cir. 2003); Appellee Br., *Boumediene v. Bush*, Nos. 05-5062, 05-5063, 2005 WL 1387147 (D.C. Cir. 2005), at 15; Appellant Br., *Padilla v. Hanft*, No. 05-6396, 2005 WL 1656804 (4th Cir. 2005).

justified not as ancillary to the invasion of Iraq but rather by the far more amorphous rubric of the "war" on terrorism. That "war" manifestly is not a war in any sense of that term against any nation or well-defined enemy, nor is it a war with any definable geographic arena of conflict, nor a war in which one can pinpoint a date when hostilities end and it most assuredly is not a war ever declared by Congress. In an undeclared war, unbounded by time, place or the identity of the enemy, the court of appeals radically extended legal precedents set during conventional wars.

The application of conventional-war concepts to a war on terrorism (where terrorism is an identifiable *method*, rather than an identifiable *enemy*) raises profound legal issues with which this Court in due course will grapple. Many of these questions, including those surrounding the President's use of troops and armaments, are not presented here. This case challenges (1) a commission without explicit Congressional authorization, (2) in a place far removed from hostilities, (3) to try an offense unknown to the laws of war, (4) under procedures that flout basic tenets of military justice, (5) against a civilian who contests his unlawful combatancy.

The court of appeals gave the President the authority and power to launch a commission in each circumstance. That any one of them, by itself, might merit certiorari, due to the departure from norms of Article III and court-martial adjudication, is incontrovertible. Taken together, they present questions of enormous importance on which the Court's guidance is needed, just as it was in *Quirin*, where the Court sat in Special Term despite the exigencies of war:

> In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court.

317 U.S. at 19. The Court did not wait until the defendants were convicted, echoing the dispatch it applied in other

cases involving separation of powers challenges even when life imprisonment and the death penalty were not at stake.[4] *See also Eisentrager, supra* (certiorari from military commission); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Indeed, the flurry of legislative activity preceding William McCardle's pretrial commission challenges suggests the way the Court has handled them in the past. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868).

For the reasons that follow, "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The decision below also is inconsistent with those of other courts of appeal in multiple ways.

A. The Court of Appeals Erroneously Decided that the AUMF and UCMJ Authorize this Military Commission

1. *Petitioner's military commission violates the separation of powers.* The court of appeals' decision conflicts deeply with the fundamental principles set forth in this Court's landmark *Milligan* opinion. "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," for the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 71 U.S. at 120-21, 127.

Today, the President's unilateral creation of commissions, his single-handed definition of the offenses and persons subject to their jurisdiction, and his promulgation of the

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[4] *E.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (certiorari before judgment granted); *United States v. Nixon*, 417 U.S. 927 (1974); *Wilson v. Girard*, 354 U.S. 524, 526 (1957); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger*, 351 U.S. 470, 473 (1956); *Youngstown*, 343 U.S. at 588-89; *cf. Mistretta v. United States*, 488 U.S. 361, 371 (1989).

rules of procedure combine to violate separation of powers. Yet the court of appeals did not even mention *Milligan*.

This disregard of *Milligan* might be explained by the subsequent *Quirin* case. But see *Duncan*, 327 U.S. at 322-24 (relying on *Milligan*).[5] Without this Court's direction, *Quirin* quite simply is too unstable an edifice on which to build further expansions of presidential power. See *Hamdi*, 124 S. Ct. at 2670 n.4 (Scalia, J., dissenting) ("The plurality's assertion that *Quirin* somehow 'clarifies' *Milligan* is simply false...[T]he *Quirin* Court propounded a mistaken understanding of *Milligan*; but nonetheless its holding was limited to 'the case presented by the present record,' and to 'the *conceded facts*,' and thus avoided conflict with the earlier case.") (internal citations omitted); *id.* at 2682 (Thomas, J., dissenting); P. O'Donnell, *In Time of War* 255 (2005) (stating that, in writing *Quirin*, Chief Justice Stone thought stripping JAG review and other aspects "probably conflict[ed]" with the Articles of War but the men had been executed); *id.* 265 (describing criticisms of Frankfurter, J., Douglas, J., and others); Danelski, *The Saboteurs' Case*, J. S. Ct. Hist. 61 (1996).

If *Quirin* is to have such unbounded vitality sixty years later to subject people to death and life imprisonment, in the wake of much criticism from members of the Court (including those in the *Quirin* majority) and elsewhere, its resurrection-and an overruling of *Milligan*'s core-must come from the Court, in a case squarely presenting the issue.

2. *The AUMF does not authorize military commissions.* The

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[5] [The Founders] were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws....We have always been especially concerned about the potential evils of summary criminal trials...*see Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

...[T]he only [other] time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than ...recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Milligan*.

Duncan, 327 U.S. at 322-24; see *Reid*, 354 U.S. at 30 (plurality) (describing *Milligan* as "one of the great landmarks in this Court's history").

panel analogized the AUMF to the Declaration of War in World War II, finding that in authorizing "force," Congress also implicitly authorized commissions. The AUMF is conspicuously silent on the subject. While "force" implies the power to detain those captured in battle, it does not imply a power to set up judicial tribunals far removed from zones of combat or military occupation. "Such a latitudinarian interpretation...would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality).

The court of appeals broadly read *Hamdi v. Rumsfeld*, *supra*, to suggest that military commissions may try U.S. citizens. App. 6a.[6] But *Hamdi* dealt only with detention, not trial.[7] While the law on detention has changed somewhat since World War II, the law of military trial has changed dramatically. Moreover, Mr. Hamdi faced detention because he bore arms against U.S. forces on the Afghani battlefield. Here, Respondents do not rest upon the Afghani conflict, but rather upon Petitioner's purported status as a member of al Qaeda. And there are deep questions as to whether the procedure relied upon by the court of appeals to say that

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[6] *Hamdi* expressly declined to rule on the scope of the President's authority. 124 S. Ct. at 2639 (plurality). It emphasized that the AUMF only authorized continuing detention of individuals who were confirmed enemy combatants, whose status had to be determined "in a proceeding that comports with due process." *Id.* at 2643. And it repeatedly looked to the GPW to outline government powers. *Id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles").

[7] *Hamdi*'s historical description is not in dispute: "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' *Ex parte Quirin*, 317 U.S. at 28." 124 S. Ct. at 2640. But even this does not answer the question of what type of tribunal can try such combatants. *See also id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances").

Justice Thomas' opinion in *Hamdi*, which Respondents relied upon to suggest a fifth vote for the lawfulness of commissions, was carefully circumscribed to detention, mentioning the term (or derivations of the term such as "detain") over forty times. *Id.* at 2674, 2677-85. Justice Thomas acknowledged that *punishment* stands on an entirely different footing than detention, specifically isolating the *Milligan* case. *Id.* at 2682.

Hamdan is an "enemy combatant" subject to a commission meets the requirements of *Hamdi*. To avoid confusion about the reach of *Hamdi* is ample reason itself for certiorari.

Moreover, the court of appeals' conflation of the AUMF with a Declaration of War creates a circuit split. The Court of Appeals for the Armed Forces has precluded military jurisdiction over civilians because, under the UCMJ, the "words 'in time of war' mean ...a war formally declared by Congress" and "a strict and literal construction of the phrase 'in time of war' should" confine jurisdiction. *United States v. Averette*, 19 C.M.A. 363, 365 (1970); *see Zamora v. Woodson*, 19 C.M.A. 403 (1970) (holding that "in time of war" means "a war formally declared by Congress," and that Vietnam did not qualify); *Robb v. U.S.*, 456 F.2d 768 (Ct. Cl. 1972) (similar).[8]

3. *There is a substantial question as to whether the laws of war permit commission trial of Petitioner.* In other recent authorizations of force, such as those for Iraq and Vietnam, the United States has not used military commissions. The AUMF lacks even the traditional tether of an authorization confined to a specific nation-state or a specific conflict; it permits force when "terrorism" is at issue. That the President can exercise power over armaments and troops to fight terrorism anywhere is unquestionable under domestic law; but the AUMF does not give the President the further ability to redefine the laws of war. And this Court has never found that the laws of war authorize commissions, and their attendant supplanting of open civil and military courts, in circumstances where only "force" was authorized.

In the World War II cases relied upon by the court of appeals, commissions tried crimes in a war between nation-states. There was no question as to whether the conflict implicated the laws of war. Equally there was no serious

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[8] Additional circuit conflict exists regarding the need for explicit authorization. *Compare El Shifa Pharm. Indus. v. United States* 378 F.3d 1346, 1362 (Fed. Cir. 2004) (not requiring explicit statutory authority under *Quirin*) *with Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921, *24 (D.S.C. Feb. 28, 2005) (requiring specific authorization) (currently on appeal); *Padilla v. Rumsfeld*, 352 F.3d 695, 716 (2d Cir. 2003) (requiring "clear congressional authorization" under *Quirin*), *rev'd on other grounds*, 542 U.S. 426 (2004).

factual question as to whether the defendants fell within the jurisdiction of commissions. The question was answered in all but the case of the American citizen in *Quirin* by the fact that the accused was a citizen of a country with which we were at war and therefore an enemy.[9] *E.g., Eisentrager*, 339 U.S., at 772-73 ("when two states are at war, the citizens of each state regard in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such") (citations omitted). Al Qaeda, however, is not a nation state. An accused's enemy status cannot be determined simply by citizenship. The facts are not undisputed as to whether the accused is in fact an enemy within the laws of war. This case more closely resembles the Civil War cases, where the nature of the conflict and the status of detained individuals were both open to question.

The Court determined when the civil war began by looking to the "common law" test of whether "the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open[.]" *The Prize Cases*, 67 U.S. 635, 667 (1862); *id.*, at 682 (returning certain seized property because the war had not yet begun). *Milligan* followed that test, examining whether the courts were "open." 71 U.S., at 121. It did so, notably, even though the Government told the Court that Lambdin Milligan was an unlawful combatant who "plotted to seize" arsenals and "conspired with and armed others." *Id.* at 17.

Yet here, the court of appeals has pointed to no source of law showing that a specific act in this conflict or this specific offender is prosecutable by a commission. The question of whether the AUMF makes this case more like *Quirin* or *Milligan* cannot be dealt with *sub silentio*; there must be some showing that the laws of war permit such commissions.

Such a showing is particularly important because the

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[9] *Quirin* found that notwithstanding Haupt's U.S. citizenship the undisputed fact that he had joined the German military made him an enemy under "the Hague Convention and the law of war." 317 U.S. at 38. Haupt's relatives on the other hand were properly tried by civilian courts because they had not joined the German military and therefore could not be considered enemies under those laws of war.

panel found that the conflict was neither an international armed conflict covered by the Geneva Conventions, nor an internal armed conflict covered by Common Article 3. App. 10a-13a. If the laws of war do not recognize this conflict, however, commissions cannot proceed, for their jurisdiction is set by "the common law of war." *Vallandigham*, 68 U.S. at 249; 15a. The law of war is a body of international law "established by the usage of the world." *Dooley v. United States*, 182 U.S. 222, 231 (1901); see also Manual for Courts-Martial, Part I, Preamble. As Colin Powell warned, a finding that the Geneva Conventions do not apply "undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions." Secretary of State Memorandum, Jan. 26, 2002, http://msnbc.msn.com/id/4999363/site/newsweek.

Indeed, when Congress defined war crimes in 18 U.S.C. 2441, it defined them as violations of the Geneva Conventions, Common Article 3, and the Hague Convention and Mining Protocol. If these sources of law do not apply, a common-law commission has no offense to try. *See Quirin*, 317 U.S. at 29-31 (examining whether charge violates the laws of war and looking to Congress and common-law). Nothing in the AUMF suggests that Congress enabled the President to try charges that stray from the laws of war. If the panel correctly determined that this conflict falls outside of the GPW, then commissions lack authority to operate.

The essence of the court of appeals' contrary position is that while Petitioner has no rights under the Constitution, treaties, common-law, and statutes, he is subject to the penalties and pains of each. This Court has always rejected such claims. *See Milligan*, 71 U.S. at 131 ("If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"). The court of appeals' complete disregard of *Milligan* raises more questions than it answers.

It might be thought, as the court below suggested, that Petitioner, an alien, has no rights (unlike Milligan). App. 4a-5a (citing cases). That claim, however, militates in favor of

certiorari, for it appears to ignore *Rasul v. Bush* and other decisions of this Court.[10] Indeed, the Second Circuit, Fifth Circuit, Federal Circuit, and U.S. Court for Berlin have all declined to follow the D.C. Circuit on this question.[11] But the Ninth Circuit has followed it. *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990). Certiorari is appropriate to resolve the basic question of whether those facing trials at Guantanamo can assert *any* constitutional protection.[12] To convene trials without an answer to that basic question when the courts are in such flux is to countenance human experimentation.

4. *The UCMJ does not authorize this military commission.* The court of appeals relied on 10 U.S.C. 821 as authorization for commissions, but failed to acknowledge the limits on jurisdiction established by that very statute.[13] It lacks any

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[10] 124 S. Ct. 2686, 2698 n.15 (2004) ("Petitioners' allegations ...unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring), and cases cited therein"); *id.* at 2700 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities"). It is separately in tension with *Zschernig v. Miller*, 389 U.S. 429 (1968), and *Asahi Metal v. Superior Court*, 480 U.S. 102 (1987), which permit nonresident aliens to raise constitutional objections.

[11] *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) (permitting Libya to assert that Foreign Sovereign Immunities Act "unconstitutionally delegate[d] legislative power"); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (applying due process clause to Guantanamo), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993); *Canal Zone v. Scott*, 502 F.2d 566, 569 (5th Cir. 1974) (applying Sixth Amendment); *United States v. Tiede*, 86 F.R. D. 227, 242, 249, 259 (U.S. Ct. Berlin 1979)("there has never been a time when United States authorities exercised governmental powers in any geographical area--whether at war or in times of peace--without regard for their own Constitution. *Ex parte Milligan*....[T]he *Insular Cases* do not apply when the United States is acting as prosecutor in its own court" finding *Milligan* a chief restraint on military tribunals); *El Shifa*, 378 F.3d at 1352 ("[W]e decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens").

[12] Indeed, one district court has held that Guantanamo detainees are entitled to constitutional rights, and another has disagreed. *Compare In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) ("In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.") *with Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005). Both decisions are on appeal.

[13] 10 U.S.C. 821 provides: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with

affirmative statement of jurisdiction. Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1280-93 (2002). And Respondents point to no law that identifies Petitioner as an "offender" or conspiracy as a triable "offense" under it. Indeed, their reading transforms the statute into an unconstitutional delegation of power. *Id.*, at 1290.[14]

Far from authorizing the commission trying Mr. Hamdan, Congress forbade it. 10 U.S.C. 3037(c) provides:

> The Judge Advocate General . . . shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority." Louis Fisher, *Military Tribunals and Presidential Power* 124 (2005). But the Military Order cuts the JAG, who is presidentially appointed and Senate confirmed, entirely out of the process.

Moreover, Congress has forbidden two-track justice whereby a non-citizen is "subject to...different punishments, pains, or penalties, on account of such person being an alien." 18 U.S.C. 242.[15] By its very terms, the Military Order funnels non-citizens, and only non-citizens, through this separate and unequal system. No commission has taken such a step; past ones, including the one in *Quirin*, applied to

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respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

Congress has not had occasion to modify 10 U.S.C. 821 since commissions have not been used since World War II. Congress' silence suggests little, since a bicameral supermajority is needed to correct a court interpretation of a statute that gives the President unintended authority. See U.S. Const. art. I, § 7, cl. 2 (veto override clause); White House, Statement of Policy, July 21, 2005 (stating that AUMF should not be altered and recommending veto of bill to govern detention and trial of enemy combatants).

[14] *See Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); *Panama Refining v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935).

[15] See also 42 U.S.C. 1981 ("[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons.")

citizens and aliens alike. Today's two-track system means, in effect, that it is difficult for the legislature to modify statutes that have been read to authorize commissions. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express v. N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

The Military Order therefore wanders far beyond the "zone of twilight" of concurrent authority. The court of appeals' effort to squeeze every drop of meaning from the AUMF and other statutes cannot authorize *this* system of tribunals. Here, the President's powers are at their "lowest ebb." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). To sustain the commission in this case, when Respondents have ignored statutory constraints on its jurisdiction, procedures, and composition, jeopardizes the "equilibrium established by our constitutional system." *Id.*[16] Congress, after all, is vested with the power to "define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I. § 8, cl. 10.

5. *The court of appeals erroneously decided that the UCMJ does not require the presence of the accused at all stages of his trial.* The court of appeals found the commission authorized by 10 U.S.C. 836, which provides that procedures prescribed by the President for commissions "may not be contrary to or inconsistent with" the UCMJ. But that very statute forbids Petitioner's commission. As the district court put it, while

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[16] For example, the court of appeals' decision would apparently permit hundreds of terrorism cases to be transferred out of civilian courts to commissions, supplanting the careful jurisprudence and procedures of Article III courts and courts-martial. See Danny Hakim, *After Convictions, the Undoing of a Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1 (describing Article III oversight of prosecutorial abuse, particularly access to exculpatory information, in Detroit terrorism cases); U.S. Dept. of Justice, United States Attorneys' Annual Statistical Report, FY 2003, at 21 (572 terrorism cases against 786 defendants filed in FY2003); U.S. Dept. of Justice, United States Attorneys' Annual Statistical Report, FY 2002, at 21 (1046 terrorism cases filed against 1112 defendants).

"the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial...I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present." App. 42a, 46a. The court also found support for the right to be present in *Crawford*, 124 S. Ct. at 1363, where the Court recognized the right as ancient, "founded on natural justice."

Quirin and its progeny never authorized a commission to violate basic precepts of military justice, such as the right to be present. Yet as the district court held, Hamdan's commission has *already* violated that right. For what very well may be the first time since the Founding, a nondisruptive criminal defendant has been ejected from his own trial. This did not happen in *Quirin*, despite the most highly classified and damaging state secrets at issue in the trial, nor will it happen in Iraq or American courts-martial.[17] And there is absolutely no legal basis for it to happen here, at least in the absence of a statute authorizing such a dramatic departure from our traditions.

Hamdan is being tried by the first commission ever in which the UCMJ applies.[18] Even before the UCMJ, of course, fundamental rights from courts-martial extended to

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[17] *See* Amicus Br. of Noah Feldman, *Hamdan v. Rumsfeld*, D.C. Cir., http://www.law.georgetown.edu/faculty/nkk/documents/feldman.pdf.

[18] The UCMJ, unlike the predecessor Articles of War, extends its protections to leased territories, like Guantanamo, controlled by the Secretary of Defense. *Compare Yamashita*, 327 U.S. at 20 (stating that Yamashita was "not a person made subject to the Articles of War by Article 2") *and Quirin*, 317 U.S. at 47, *with* 10 U.S.C. 802(12) (expanding those "subject to this chapter" to "persons within an area leased by" the U.S. and subject to defense secretary control).

The court of appeals' narrow reading of 836 fails to give effect to its plain language, which requires that commission procedures not be contrary to or inconsistent with "this chapter," i.e., with the UCMJ, not just a handful of provisions in the UCMJ where the words "military commissions" appear. Under its reading, the President is constrained by UCMJ 849(d), governing deposition transcripts being read into evidence, but not by the UCMJ's fundamental requirement, in 839, that the accused be present for all stages of his own trial. If concerns for fundamental fairness in commission proceedings prompted Congress to regulate details like the introduction of deposition testimony, then it seems highly likely that Congress also intended the right to be present to be guaranteed. Indeed, there is no support for the court of appeals' narrow reading of 836 in any applicable military law or precedent of this Court.

commissions. Colonel Winthrop, "the Blackstone of Military Law," *Reid*, 354 U.S. at 19 n.38, recognized the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial...Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied." Winthrop, *Military Law and Precedents* 835 n.81, 842 (2d ed. 1920) (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-martial provisions to commissions).

The right to be present is universal, echoed in pronouncements of this Court, e.g., *Lewis v. United States*, 146 U.S. 370, 372, 375 (1892); common law; international law; and the UCMJ, 10 U.S.C. 839. In the Civil War, the JAG exercised his review, a power stripped in today's commissions, to invalidate a conviction for denying presence:

> [JAG Holt] repeatedly overturned the decisions of trials by military commission...Holt reviewed the sentence of Mary Clemmens . . . [stating]: "Further, it is stated that the Commission was duly sworn—but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her. These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court-martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

Neely, *The Fate of Liberty* 162 (1991) (quoting Holt's opinion).

While the court of appeals recognized that commissions are "commonlaw war courts," App. 15a, it failed to apply longstanding guarantees of presence and confrontation. The result is to break from every commission precedent. *Quirin* and *Eisentrager* do not permit such a result.

B. The Court of Appeals' Erroneous Failure to Enforce the Geneva Conventions Conflicts With Other Circuits

1. *The court of appeals mischaracterized the issue.* Mr. Hamdan's habeas claim asserts that his detention is illegal under the 1949 GPW. The fatal flaw in the court of appeals' analysis of that claim is its conclusion, based on *Eisentrager*, that "the 1949 Geneva Convention does not confer upon

Hamdan a right to enforce its provisions in court." App. 11a. The court stated that international agreements "do not create private rights or provide a private cause of action." *Id.* 8a. But this misapprehends the central issue, which, under the habeas statute, is the legality of detention, not one's standing to assert a private right of action. The former inquiry properly focuses on the conduct of the detaining authority, where attention should be in a habeas action, while the latter often, as here, poses vexing and often unnecessary questions of constitutional and international law. The district court cut through that Gordian knot by observing that "Hamdan has not asserted a 'private right of action' under the Third Geneva Convention." App. 34a. Rather, he alleges that he is being held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3).

Moreover, quite apart from the habeas aspect of this case, "it is axiomatic that, while treaties are compacts between nations, 'a treaty may also contain provisions which confer certain rights upon...subjects of one of the nations...which are capable of enforcement as between private parties in the courts of the country.'" *Medellin v. Dretke*, 125 S. Ct. 2088, 2099-2100 (2005) (O'Connor, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). The panel lost sight of this fact, as its truncated quotation from *Head Money Cases* reveals. App. 7a.

The court of appeals also lost sight of the fact that "[t]his Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties...do not share any special magic words. Their rights-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement." *Medellin*, 125 S. Ct. at 2104 (O'Connor, J., dissenting) (citing cases).

2. *The court of appeals misread Eisentrager.* The court of appeals based its holding primarily on *dicta* in *Eisentrager* concerning a different treaty, the 1929 Geneva Convention. *Eisentrager* held that alien enemy combatants did not have habeas rights. That portion of *Eisentrager* is no longer good

law after *Rasul* held that such combatants could file such petitions. After deciding the habeas issue, *Eisentrager* stated that the 1929 Convention did not protect the defendants. It further stated, in what three Justices criticized as "gratuitous" *dicta*, 339 U.S. at 794 (Black, J., dissenting, joined by Douglas, J., and Burton, J.)) that "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14.

From this *dicta*, the court of appeals erroneously concluded that Hamdan could not enforce the GPW. But the *Eisentrager* Court considered a different issue than that raised by Hamdan—whether, separate from the habeas petition (a right denied by that opinion), an alien enemy combatant had an independent cause of action under the 1929 Convention. *Eisentrager* had to have considered this claim as a cause of action independent from the habeas petition or the first part of the opinion would have wholly foreclosed its consideration. Unlike petitioners in *Eisentrager*, Hamdan claims in a habeas petition (his right being confirmed under *Rasul*), that his detention is inconsistent with the laws and treaties of the United States, including the 1949 GPW. Were habeas law as found by the court of appeals below, no habeas petitioner could assert a valid claim unless the statute or treaty invoked expressly conferred a cause of action or judicially enforceable private rights. Because few treaties or statutes contain such express provisions, such a holding would largely eviscerate habeas rights in all but the most limited of circumstances.

The court of appeals' interpretation of the 1949 GPW, based on some phrases in a footnote about the 1929 Convention, is unpersuasive. This Court has repeatedly enforced treaty-based rights for the benefit of individuals who invoke them, even where those treaties had diplomatic enforcement provisions. *See, e.g., Chew Heong v. United States*, 112 U.S. 536 (1884); *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

The very first Article of the GPW requires the Parties "to

respect and to ensure respect for the present Convention in all circumstances." In this country, an essential part of the legal structure that ensures such compliance is the power of Article III courts to interpret and enforce treaties under the Judiciary and Supremacy Clauses, U.S. Const. art. III, § 2, cl. 1; art. VI, § 2, and under the habeas statute. The court of appeals would abdicate this responsibility, yielding to a demand for deference from the President. But this Court, not an intermediate court, must settle the question:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.

FEDERALIST No. 22, at 150 (Hamilton) (Rossiter ed. 1961).

Finally, even if the court of appeals had read *Eisentrager* properly, certiorari would still be appropriate to allow this Court to consider the vitality of *Eisentrager* in the aftermath of *Rasul* and the half-century of other developments in national and international law. *See, e.g., Medellin*, 125 S. Ct. at 2105 ("In the past the Court has revisited its interpretation of a treaty when new international law has come to light") (O'Connor, J., dissenting).

The case for reevaluation here is particularly compelling, since the specific treaty provisions at issue in *Eisentrager* have been reversed. In words ignored by the panel below, *Eisentrager* found that, under the 1929 Convention, the individual-rights provisions invoked by the Petitioners *did not* "appl[y] to a trial for war crimes." 339 U.S. at 789.[19] GPW Article 85 was written to *reverse* that interpretation, which originally came from *Yamashita*, 327 U.S. at 22. Yet the panel wrongly insisted, citing anachronistic passages from *Eisentrager*, that the 1929 Convention "protects individual rights." App. 10a. In Eisentrager's time, it didn't. Now the GPW does. By characterizing the 1929 Convention as protecting Eisentrager's rights, the panel erroneously

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[19] GPW Arts. 85 and 102 and Art. 146 of the Fourth Convention specifically broke from these limitations and revolutionized the protection of individual rights in war. See, e.g., Geoffrey Best, *War and Law Since 1945* 80-114 (1994).

sidestepped the Court's many precedents, such as the *Head Money Cases*, 112 U.S. at 598, which require enforcement when treaty-based individual rights are at issue.[20]

3. *The court of appeals created a circuit split.* At least two circuits have recently emphasized the distinction between a treaty's creation of a private cause of action and a treaty's creation of rights enforceable through *otherwise available* causes of action, such as the habeas statute. *See Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003) (emphasizing that serious constitutional questions might arise were aliens not entitled to bring habeas claims asserting rights under the Convention Against Torture, CAT, a non-self-executing treaty); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218-20 & n.22 (3d Cir. 2003). *See also Auguste v. Ridge*, 395 F.3d 123, 137 (3d Cir. 2005); *Cadet v. Bulger*, 377 F.3d 1173, 1181-82 (11th Cir. 2004); *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Notably, decisions such as *Wang* and *Ogbudimkpa* enforced rights conferred by a non-self executing treaty despite explicit language in the statute executing the treaty to deny federal jurisdiction. *See* Foreign Affairs Reform and Restructuring Act §2242 (1998), 8 U.S.C. 1231 n. ("[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under" CAT). The courts held that *INS v. St. Cyr*, 533 U.S. 289 (2001), required that habeas review be preserved and afforded to the petitioners, because Congress had not made the clear, unambiguous statement necessary to preclude such review

In contrast, the panel in this case was of the view that hardly any treaty-based rights are capable of judicial enforcement. That broad statement not only conflicts with

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[20] In addition, *Eisentrager* did not involve the provision of the habeas statute at issue here, 28 U.S.C. 2241(c)(3). Eisentrager asserted only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein...in custody for an act done or omitted under any alleged...sanction of any foreign state...the validity and effect of which depend upon the law of nations." 28 U.S.C. 2241(c)(4); Br. for Resp't, *Johnson v. Eisentrager*, at 2, 24-26. The Court in *Eisentrager* had no cause to answer the question of whether 2241(c)(3) makes the Geneva Convention, either of 1929 or 1949, enforceable.

this Court's longstanding recognition of habeas as a remedy for treaty violations, *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887); taken to its logical extreme, it also reads out of the plain-text of 2241(c)(3) a guarantee that habeas is available for violations of "treaties of the United States."

The case for Hamdan's protection under the Geneva Conventions is far stronger than that presented in the other Circuits, since the court below read two statutes, 10 U.S.C. 821, 836, to authorize commissions. Those statutes must be interpreted consistently with international law, for "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *The Charming Betsy*, 6 U.S. at 118; U.S. Petr. Br., No. 04-1084, *Gonzales v. O Centro Espirita Etc.*, at 41-47 (relying heavily on *Charming Betsy* to interpret RFRA); *Reid*, 354 U.S., at 18 n.34 ("By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation...(I)f the two are inconsistent, the one last in date will control") (internal citations omitted) (plurality); *Cook v. United States*, 288 U.S. 102 (1933). Even if Hamdan is not protected by 2241(c)(3)'s reference to "treaties," he is thus protected by its reference to "custody in violation of the ... laws..."

Finally, even if the GPW does not allow the courts any role in its enforcement, the court of appeals' reliance on *Eisentrager* predates Army Reg. 190-8, §1-6(a), which implements the GPW, as recognized by Souter, J., concurring in the judgment in *Hamdi*, 124 S. Ct. at 2658. It is well-settled that such regulations are judicially enforceable. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957). The panel's claim that the President is "competent authority" to make a status determination of Petitioner, a determination essential to providing a commission with jurisdiction, is questionable, and raises conflicts with *Hamdi*.

It may be that this Court will ultimately conclude that the court below reached the right result regarding the 1949 Conventions. But our nation's most important trials in the wake of September 11 simply cannot rest on one sentence of *dicta* in a footnote of a 55-year old case.

4. *The court of appeals misinterpreted the GPW.* Under GPW Article 5, if any doubt exists as to whether an individual is entitled to its protections, that person must be afforded all protections "until such time as their status has been determined by a competent tribunal."

GPW Art. 102 provides that persons "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The district court duly held that a commission "is not such a court. Its procedures are not such procedures." App. 29a.

The court of appeals, however, vested the President with the ability to declare entire conflicts and groups not eligible for the above protections. As the district court recognized, such a decision not only imperils relationships with other nations, it also threatens the ability of our Government to demand compliance with the Geneva Conventions when American troops are captured. App. 34a.[21]

The court also claimed that the GPW does not apply to Petitioner because he is a member of al Qaeda. Not only is the factual premise in doubt, Respondents' interpretation is also refuted by the language and structure of the Convention itself. That language applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." GPW, Art. 2. Petitioner was captured in Afghanistan, and Afghanistan and the United States are High Contracting Parties.

The court of appeals suggested that Mr. Hamdan did not meet the criteria for a POW in GPW Art. 4(a)(2). Apart from the problem that Mr. Hamdan denies being part of al Qaeda,

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[21] During World War II, when Japanese Judge-Advocates tried our soldiers in a military commission that, *inter alia*, deprived American soldiers of the right to participate and violated Japanese rules for courts-martial, America responded by prosecuting the Japanese attorneys in our own commissions, despite Japan's claim that unlawful combatants have no rights. *United States v. Uchiyama* Tr., Case 35-36, War Crimes Branch, JAG Records, at 20 (Prosecution's opening statement: "[The accused] applied to them a special type of summary procedure which failed to afford them the minimal safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war."). See Jess Bravin, *Will Old Rulings Play a Role in Terror Cases?*, Wall St. J., Apr. 7, 2005, at B1 (providing other examples of American military commissions prosecuting Japanese JAGs for not providing Geneva Convention and other protections to our captured troops in Japanese war-crimes trials); App. 81a-95a.

his claim for POW status has always rested on other provisions, including GPW Art. 4(a)(1) and (4), as well as Common Article 3. The four requirements mentioned by the court below are not at issue.

Respondents wrongly claim that the Executive's interpretation of a treaty is conclusive and unreviewable. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). The district court correctly applied the longstanding canon that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal citation omitted).

5. *This court should grant certiorari to resolve the split in authority about Common Article 3.* The divided court below held that Mr. Hamdan is not protected by this Article. It agreed with Respondents that the conflict against al Qaeda was "separate" from the Taliban (who controlled Afghanistan), and that the Article does not extend to armed conflicts against non-state entities. This holding directly conflicts with *Kadic v. Karadzic*, where the Second Circuit held that "all 'parties' to a conflict–which includes insurgent military groups–are obliged to adhere to these most fundamental requirements of the law of war." 70 F.3d 232, 243 (2d Cir. 1995); *see also Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 n.39 (N.D. Ga. 2002).

The circuit court conflict regarding Common Article 3 is replicated in this very case, as Judge Williams stated:

> [T]he logical reading of 'international character' is one that matches the basic derivation of the word 'international,' i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict 'not of an international character.' In such a conflict, the signatory is bound to Common Article 3's modest requirements.

App. 16a-18a (Williams, J., concurring). To not apply Article 3, moreover, would remove any basis for commissions to exist or to try offenses. See pp.14-16, *supra*. "[A]s a matter of law, there can be no wars in which one side has all the rights and the other has none." Intl. Comte. Red Cross, *International Humanitarian Law*, at 19 (2003) http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf.

C. The Court Should Hear this Case Now

1. Mr. Hamdan faces the first commission since the ratification of the Geneva Conventions and the enactment of the UCMJ. The court of appeals, lacking modern guidance from this Court, had to rely on precedent that predated these developments. But 1942 law, even clear 1942 law, is simply not good enough to decide a case of such gravity.

This case squarely and robustly presents the issues on which the Court's guidance is needed. Petitioner did not receive an Article 5 hearing under the GPW or under AR 190-8 before his criminal trial began; he is being prosecuted in the name of the laws of war, and the President has invoked 10 U.S.C. 821, 836. He receives different protections than all others who face courts-martial under the UCMJ, and his right to be present has already been taken away.

As the court of appeals held, Mr. Hamdan challenges the legitimacy and jurisdiction of the commission, so "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." App. 4a (citing *Abney*, 431 U.S. at 662); *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) (en banc). To force Hamdan to endure a trial whose legitimacy is not finally resolved will also preview his trial defense for the prosecution, vitiating his rights.[22] This point is particularly salient in the wake of reports that the commission's own prosecutors stated that "the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants [which include Hamdan] would be 'handpicked' to ensure that all would be convicted." Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1; App 96a-102a.

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[22] *See Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (holding that, even in immigration context, a "substantial practical litigation advantage" is lost by forcing someone to go through a summary proceeding because "if he presents his defense in [the summary] proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any [plenary] proceeding; if, however, he does not present his factual defense now, he risks foresaking his only opportunity to present a factual defense").

2. Even hefty appreciation for the passive virtues requires a point at which some guidance *ex ante* is appropriate. Like *Quirin*, this is that point. The court of appeals has said that in this new war, there are virtually no ground rules. If that is to be the law, such a statement must come from this Court.

If the Court were to decline certiorari, it may not have occasion to reach these weighty issues again for many years. In an ordinary trial, dispatch is inherent in speedy-trial guarantees and other time-tested limits. Notably, Respondents have claimed that, unlike any other American civilian or military trials, no speedy-trial rights exist here. A conviction may not happen for many months, if not years. After that, the case is submitted to a Review Panel, and then to the Secretary of Defense or President. There are no time limits on this latter review. Bearing in mind that Petitioner was detained for nearly three years before he was charged, and only received charges after this lawsuit was filed and *Rasul* decided, further delays should be expected.

Once the trial, Review Panel, and President/Secretary determination is made regarding Mr. Hamdan's fate, another multi-year delay is likely. Unlike state courts and courts-martial, no direct appeal exists from the commission process to this Court. Even if Mr. Hamdan received a President/Secretary determination tomorrow, and filed a collateral district court lawsuit that day, the pace of litigation in the D.C. Circuit for even *expedited* cases suggests that it would be October Term 2007 at the earliest before his case would reach the Petition stage. *See, e.g., Rasul*, 124 S. Ct. 2686 (decided June, 2004, scheduled on expedited appeal for argument in D.C. Circuit next month). This two-year schedule is derived from purely federal cases, not ones that also require the discovery, pretrial, and trial procedures of a commission. If the Court does not grant certiorari, the sweeping authority given to the President may be his for several years before the Court has another opportunity to clarify even the most basic ground rules for commissions.

Of course, this Court ordinarily does not sit to clarify rules at the outset of criminal trials. But as Respondents and

the court below have stated, this is not an ordinary trial. The Questions Presented go to the heart of the integrity of our judicial system. Just as wars, once started, cannot be undone, so, too, it is with commission trials. They are not regular courts applying established rules and routines. Rather, they are proceedings where not a single right is guaranteed to the defense, making trial strategy impossible, particularly when they hover under a cloud of legal uncertainty, however much temporarily dissipated by the court of appeals.

In similar cases, such as *Quirin* and *Reid*, certiorari *before* judgment was granted. The propriety of certiorari here is even greater, given the broad lower court decision, the interests at stake, and questions surrounding this Court's precedent. This Court's review of the panel's conclusions, no matter what the outcome, will provide authoritative guidance to the Executive, Congress, bench, bar, and world.

3. Due to the consolidation of all commission litigation in Washington, *Padilla*, 124 S. Ct. at 2725 n.16, the court below has crafted a national holding that affords unprecedented deference to the Executive. No "percolation" is possible, and the Court should decide this case now, before the delicate issue of undoing criminal convictions presents itself.

If commissions are worth conducting, they are worth conducting lawfully and being perceived as so conducted. Deploying them under far-reaching intermediate court decisions or in jurisdictionally dubious contexts can only work a disservice to their potential utility when conducted under legally appropriate ground rules. Before embarking on a dangerous experiment to break not only from common-law and international law, but also from our traditions of military justice, Americans and the rest of the world should rest assured that these principles will not be abandoned without at least review by the highest Court in the land.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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August 8, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5393

SALIM AHMED HAMDAN,
APPELLEE

v.

DONALD H. RUMSFELD, UNITED STATES SECRETARY OF DEFENSE, ET AL,
APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(04CV01519)

Argued April 7, 2005

Decided July 15, 2005
Reissued July 18, 2005

Before: RANDOLPH and ROBERTS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

RANDOLPH, *Circuit Judge*: Afghani militia forces captured Salim Ahmed Hamdan in Afghanistan in late November 2001. Hamdan's captors turned him over to the American military, which transported him to the Guantanamo Bay Naval Base in Cuba. The military initially kept him in the general detention facility, known as Camp Delta. On July 3, 2003, the President determined "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism

directed against the United States." This finding brought Hamdan within the compass of the President's November 13, 2001, Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833. Accordingly, Hamdan was designated for trial before a military commission.

In December 2003, Hamdan was removed from the general population at Guantanamo and placed in solitary confinement in Camp Echo. That same month, he was appointed counsel, initially for the limited purpose of plea negotiation. In April 2004, Hamdan filed this petition for habeas corpus. While his petition was pending before the district court, the government formally charged Hamdan with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. The charges alleged that Hamdan was Osama bin Laden's personal driver in Afghanistan between 1996 and November 2001, an allegation Hamdan admitted in an affidavit. The charges further alleged that Hamdan served as bin Laden's personal bodyguard, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at the al Qaeda-sponsored al Farouq camp. Hamdan's trial was to be before a military commission, which the government tells us now consists of three officers of the rank of colonel. Brief for Appellants at 7.

In response to the Supreme Court's decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), Hamdan received a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant, "either a member of or affiliated with Al Qaeda," for whom continued detention was required.

On November 8, 2004, the district court granted in part Hamdan's petition. Among other things, the court held that Hamdan could not be tried by a military commission unless a

competent tribunal determined that he was not a prisoner of war under the 1949 Geneva Convention governing the treatment of prisoners. The court therefore enjoined the Secretary of Defense from conducting any further military commission proceedings against Hamdan. This appeal followed.

I.

The government's initial argument is that the district court should have abstained from exercising jurisdiction over Hamdan's habeas corpus petition. *Ex parte Quirin*, 317 U.S. 1 (1942), in which captured German saboteurs challenged the lawfulness of the military commission before which they were to be tried, provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions. The Supreme Court ruled against the petitioners in *Quirin*, but only after considering their arguments on the merits. In an effort to minimize the precedential effect of *Quirin*, the government points out that the decision predates the comity-based abstention doctrine recognized in *Schlesinger v. Councilman*, 420 U.S 738 (1975), and applied by this court in *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997). *Councilman* and *New* hold only that civilian courts should not interfere with ongoing court-martial proceedings against citizen servicemen. The cases have little to tell us about the proceedings of military commissions against alien prisoners. The serviceman in *Councilman* wanted to block his court-martial for using and selling marijuana; the serviceman in *New* wanted to stop his court-martial for refusing to obey orders. The rationale of both cases was that a battle-ready military must be able to enforce "a respect for duty and discipline without counterpart in civilian life," *Councilman*, 420 U.S. at 757, and that "comity aids the military judiciary in its task of maintaining order and discipline in the armed services," *New*, 129 F.3d at 643. These concerns do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value.

Even within the framework of *Councilman* and *New*, there is an exception to abstention: "a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *New*, 129 F.3d at 644. The theory is that setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction. *See Abney v. United States*, 431 U.S. 651, 662 (1977). The courts in *Councilman* and *New* did not apply this exception because the servicemen had not "raised *substantial* arguments denying the right of the military to try them at all." *New*, 129 F.3d at 644 (citing *Councilman*, 420 U.S. at 759). Hamdan's jurisdictional challenge, by contrast, is not insubstantial, as our later discussion should demonstrate. While he does not deny the military's authority to try him, he does contend that a military commission has no jurisdiction over him and that any trial must be by court-martial. His claim, therefore, falls within the exception to *Councilman* and, in any event, is firmly supported by the Supreme Court's disposition of *Quirin*.

II.

In an argument distinct from his claims about the Geneva Convention, which we will discuss next, Hamdan maintains that the President violated the separation of powers inherent in the Constitution when he established military commissions. The argument is that Article I, §8, of the Constitution gives Congress the power "to constitute Tribunals inferior to the supreme Court," that Congress has not established military commissions, and that the President has no inherent authority to do so under Article II. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1284-85 (2002).

There is doubt that this separation-of-powers claim properly may serve as a basis for a court order halting a trial before a military commission, *see United States v. Cisneros*, 169 F.3d 763, 768-69 (D.C. Cir. 1999), and there is doubt

that someone in Hamdan's position is entitled to assert such a constitutional claim, *see People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). In any event, on the merits there is little to Hamdan's argument.

The President's Military Order of November 13, 2001, stated that any person subject to the order, including members of al Qaeda, "shall, when tried, be tried by a military commission for any and all offenses triable by [a] military commission that such individual is alleged to have committed . . .." 66 Fed. Reg. at 57,834. The President relied on four sources of authority: his authority as Commander in Chief of the Armed Forces, U.S. CONST., art. II, § 2; Congress's joint resolution authorizing the use of force; 10 U.S.C. § 821; and 10 U.S.C. § 836. The last three are, of course, actions of Congress.

In the joint resolution, passed in response to the attacks of September 11, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). *In re Yamashita*, 327 U.S. 1 (1946), which dealt with the validity of a military commission, held that an "important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *Id.* at 11. "The trial and punishment of enemy combatants," the Court further held, is thus part of the "conduct of war." *Id.* We think it no answer to say, as Hamdan does, that this case is different because Congress did not formally declare war. It has been

suggested that only wars between sovereign nations would qualify for such a declaration. *See* John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 918 (2003). Even so, the joint resolution "went as far toward a declaration of war as it might, and as far or further than Congress went in the Civil War, the Philippine Insurrection, the Boxer Rebellion, the Punitive Expedition against Pancho Villa, the Korean War, the Vietnam War, the invasion of Panama, the Gulf War, and numerous other conflicts." *Id.* at 917. The plurality in *Hamdi v. Rumsfeld*, in suggesting that a military commission could determine whether an American citizen was an enemy combatant in the current conflict, drew no distinction of the sort Hamdan urges upon us. 124 S. Ct. at 2640-42.

Ex parte Quirin also stands solidly against Hamdan's argument. The Court held that Congress had authorized military commissions through Article 15 of the Articles of War. 317 U.S. at 28-29; *accord In re Yamashita*, 327 U.S. at 19-20. The modern version of Article 15 is 10 U.S.C. § 821, which the President invoked when he issued his military order. Section 821 states that court-martial jurisdiction does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." Congress also authorized the President, in another provision the military order cited, to establish procedures for military commissions. 10 U.S.C. § 836(a). Given these provisions and *Quirin* and *Yamashita*, it is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2129-31 (2005). He attempts to distinguish *Quirin* and *Yamashita* on the ground that the military commissions there were in "war zones" while Guantanamo is far removed from the battlefield. We are left to wonder why this should matter and, in any event, the distinction does not hold: the military commission in *Quirin* sat in

Washington, D.C., in the Department of Justice building; the military commission in *Yamashita* sat in the Phillipines after Japan had surrendered.

We therefore hold that through the joint resolution and the two statutes just mentioned, Congress authorized the military commission that will try Hamdan.

III.

This brings us to Hamdan's argument, accepted by the district court, that the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("1949 Geneva Convention"), ratified in 1955, may be enforced in federal court.

"Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST ., art. VI, cl. 2. Even so, this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights. *See Holmes v. Laird*, 459 F.2d 1211, 1220, 1222 (D.C. Cir. 1972); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). As a general matter, a "treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit. *Id.*; *see Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306, 314 (1829), *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1883).

Thus, "[i]nternational agreements, even those directly

benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a, at 395 (1987). The district court nevertheless concluded that the 1949 Geneva Convention conferred individual rights enforceable in federal court. We believe the court's conclusion disregards the principles just mentioned and is contrary to the Convention itself. To explain why, we must consider the Supreme Court's treatment of the Geneva Convention of 1929 in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and this court's decision in *Holmes v. Laird*, neither of which the district court mentioned.

In *Eisentrager*, German nationals, convicted by a military commission in China of violating the laws of war and imprisoned in Germany, sought writs of habeas corpus in federal district court on the ground that the military commission violated their rights under the Constitution and their rights under the 1929 Geneva Convention. 339 U.S. at 767. The Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. We relied on this holding in *Holmes v. Laird*, 459 F.2d at 1222, to deny enforcement of the individual rights provisions contained in the NATO Status of Forces Agreement, an international treaty.

This aspect of *Eisentrager* is still good law and demands our adherence. *Rasul v. Bush*, 124 S. Ct. 2686 (2004), decided a different and "narrow" question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 "to consider challenges to the legality of the detention of foreign nationals" at Guantanamo Bay. *Id.* at 2690. The Court's decision in *Rasul* had nothing to say about enforcing any Geneva Convention. Its holding that federal courts had habeas corpus jurisdiction had no effect on

Eisentrager's interpretation of the 1929 Geneva Convention. That interpretation, we believe, leads to the conclusion that the 1949 Geneva Convention cannot be judicially enforced.

Although the government relied heavily on *Eisentrager* in making its argument to this effect, Hamdan chose to ignore the decision in his brief. Nevertheless, we have compared the 1949 Convention to the 1929 Convention. There are differences, but none of them renders *Eisentrager*'s conclusion about the 1929 Convention inapplicable to the 1949 Convention. Common Article 1 of the 1949 Convention states that parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." The comparable provision in the 1929 version stated that the "Convention shall be respected . . . in all circumstances." Geneva Convention of 1929, art. 82. The revision imposed upon signatory nations the duty not only of complying themselves but also of making sure other signatories complied. Nothing in the revision altered the method by which a nation would enforce compliance. Article 8 of the 1949 Convention states that its provisions are to be "applied with the cooperation and under the scrutiny of the Protecting Powers . . .." This too was a feature of the 1929 Convention. *See* Geneva Convention of 1929, art. 86. But Article 11 of the 1949 Convention increased the role of the protecting power, typically the International Red Cross, when disputes arose: "[I]n cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement." Here again there is no suggestion of judicial enforcement. The same is true with respect to the other method set forth in the 1949 Convention for settling disagreements. Article 132 provides that "at the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention." If no agreement is reached about the procedure for the "enquiry," Article 132 further provides that "the Parties should agree on the

choice of an umpire who will decide upon the procedure to be followed."

Hamdan points out that the 1949 Geneva Convention protects individual rights. But so did the 1929 Geneva Convention, as the Court recognized in *Eisentrager*, 339 U.S. at 789-90. The NATO Status of Forces Agreement, at issue in *Holmes v. Laird*, also protected individual rights, but we held that the treaty was not judicially enforceable. 459 F.2d at 1222.

Eisentrager also answers Hamdan's argument that the habeas corpus statute, 28 U.S.C § 2241, permits courts to enforce the "treaty-based individual rights" set forth in the Geneva Convention. The 1929 Convention specified individual rights but as we have discussed, the Supreme Court ruled that these rights were to be enforced by means other than the writ of habeas corpus. The Supreme Court's *Rasul* decision did give district courts jurisdiction over habeas corpus petitions filed on behalf of Guantanamo detainees such as Hamdan. But *Rasul* did not render the Geneva Convention judicially enforceable. That a court has jurisdiction over a claim does not mean the claim is valid. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946). The availability of habeas may obviate a petitioner's need to rely on a private right of action, *see Wang v. Ashcroft*, 320 F.3d 130, 140-41 & n.16 (2d Cir. 2003), but it does not render a treaty judicially enforceable.

We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court. *See Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978).

IV.

Even if the 1949 Geneva Convention could be enforced in court, this would not assist Hamdan. He contends that a military

commission trial would violate his rights under Article 102, which provides that a "prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." One problem for Hamdan is that he does not fit the Article 4 definition of a "prisoner of war" entitled to the protection of the Convention. He does not purport to be a member of a group who displayed "a fixed distinctive sign recognizable at a distance" and who conducted "their operations in accordance with the laws and customs of war." *See* 1949 Convention, arts. 4A(2)(b), (c) & (d). If Hamdan were to claim prisoner of war status under Article 4A(4) as a person who accompanied "the armed forces without actually being [a] member[] thereof," he might raise that claim before the military commission under Army Regulation 190-8. *See* Section VII of this opinion, *infra*. (We note that Hamdan has not specifically made such a claim before this court.)

Another problem for Hamdan is that the 1949 Convention does not apply to al Qaeda and its members. The Convention appears to contemplate only two types of armed conflicts. The first is an international conflict. Under Common Article 2, the provisions of the Convention apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Needless to say, al Qaeda is not a state and it was not a "High Contracting Party." There is an exception, set forth in the last paragraph of Common Article 2, when one of the "Powers" in a conflict is not a signatory but the other is. Then the signatory nation is bound to adhere to the Convention so long as the opposing Power "accepts and applies the provisions thereof." Even if al Qaeda could be considered a Power, which we doubt, no one claims that al Qaeda has accepted and applied the provisions of the Convention.

The second type of conflict, covered by Common Article 3, is a civil war -- that is, an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .." In that situation, Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by a civilized people." Hamdan assumes that if Common Article 3 applies, a military commission could not try him. We will make the same assumption *arguendo*, which leaves the question whether Common Article 3 applies. Afghanistan is a "High Contracting Party." Hamdan was captured during hostilities there. But is the war against terrorism in general and the war against al Qaeda in particular, an "armed conflict not of an international character"? *See* INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960) (Common Article 3 applies only to armed conflicts confined to "a single country"). President Bush determined, in a memorandum to the Vice President and others on February 7, 2002, that it did not fit that description because the conflict was "international in scope." The district court disagreed with the President's view of Common Article 3, apparently because the court thought we were not engaged in a separate conflict with al Qaeda, distinct from the conflict with the Taliban. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 161 (D.D.C. 2004). We have difficulty understanding the court's rationale. Hamdan was captured in Afghanistan in November 2001, but the conflict with al Qaeda arose before then, in other regions, including this country on September 11, 2001. Under the Constitution, the President "has a degree of independent authority to act" in foreign affairs, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), and, for this reason and others, his construction and application of treaty provisions is entitled to "great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). While the district court determined

that the actions in Afghanistan constituted a single conflict, the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail.

V.

Suppose we are mistaken about Common Article 3. Suppose it does cover Hamdan. Even then we would abstain from testing the military commission against the requirement in Common Article 3(1)(d) that sentences must be pronounced "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Councilman*, 420 U.S. at 759; *New*, 129 F.3d at 644; *supra* Part I. Unlike his arguments that the military commission lacked jurisdiction, his argument here is that the commission's procedures -- particularly its alleged failure to require his presence at all stages of the proceedings -- fall short of what Common Article 3 requires. The issue thus raised is not *whether* the commission may try him, but rather *how* the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront the witnesses against him raises a jurisdictional objection. Hamdan's claim therefore falls outside the recognized exception to the *Councilman* doctrine. Accordingly, comity would dictate that we defer to the ongoing military proceedings. If Hamdan were convicted, and if Common Article 3 covered him, he could contest his conviction in federal court after he exhausted his military remedies.

VI.

After determining that the 1949 Geneva Convention provided Hamdan a basis for judicial relief, the district court went on to consider the legitimacy of a military commission in the event Hamdan should eventually appear before one. In the district court's view, the principal constraint on the President's power to utilize such commissions is found in Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836, which provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter.*

(Emphasis added.) The district court interpreted the final qualifying clause to mean that military commissions must comply in all respects with the requirements of the Uniform Code of Military Justice (UCMJ). This was an error.

Throughout its Articles, the UCMJ takes care to distinguish between "courts-martial" and "military commissions." *See, e.g.*, 10 U.S.C. § 821 (noting that "provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction"). The terms are not used interchangeably, and the majority of the UCMJ's procedural requirements refer only to courts-martial. The district court's approach would obliterate this distinction. A far more sensible reading is that in establishing military commissions, the President may not adopt procedures that are "contrary to or inconsistent with" the UCMJ's provisions governing military commissions. In particular, Article 39 requires that sessions of a

"trial by *court-martial* . . . shall be conducted in the presence of the accused." Hamdan's trial before a *military commission* does not violate Article 36 if it omits this procedural guarantee.

The Supreme Court's opinion in *Madsen v. Kinsella*, 343 U.S. 341 (1952), provides further support for this reading of the UCMJ. There, the Court spoke of the place of military commissions in our history, referring to them as "our commonlaw war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute." *Id.* at 346-48. The Court issued its opinion two years after enactment of the UCMJ, and it is difficult, if not impossible, to square the Court's language in *Madsen* with the sweeping effect with which the district court would invest Article 36. The UCMJ thus imposes only minimal restrictions upon the form and function of military commissions, *see, e.g.*, 10 U.S.C. §§ 828, 847(a)(1), 849(d), and Hamdan does not allege that the regulations establishing the present commission violate any of the pertinent provisions.

VII.

Although we have considered all of Hamdan's remaining contentions, the only one requiring further discussion is his claim that even if the Geneva Convention is not judicially enforceable, Army Regulation 190-8 provides a basis for relief. This regulation, which contains many subsections, "implements international law, both customary and codified, relating to [enemy prisoners of war], [retained personnel], [civilian internees], and [other detainees] which includes those persons held during military operations other than war." AR 190-8 § 1-1(b). The regulation lists the Geneva Convention among the principal treaties relevant to this regulation." § 1-1(b)(3); *see Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring) (describing AR 190-8 as "implementing the Geneva Convention"). One subsection, § 1-5(a)(2), requires that prisoners receive the protections of the Convention "until some other legal status is determined by

competent *authority*." (Emphasis added.) The President found that Hamdan was not a prisoner of war under the Convention. Nothing in the regulations, and nothing Hamdan argues, suggests that the President is not a "competent authority" for these purposes.

Hamdan claims that AR 190-8 entitles him to have a "competent tribunal" determine his status. But we believe the military commission is such a tribunal. The regulations specify that such a "competent tribunal" shall be composed of three commissioned officers, one of whom must be field-grade. AR 90-8 § 1.6(c). A field-grade officer is an officer above the rank of captain and below the rank of brigadier general -- a major, a lieutenant colonel, or a colonel. The President's order requires military commissions to be composed of between three and seven commissioned officers. 32 C.F.R. § 9.4(a)(2), (3). The commission before which Hamdan is to be tried consists of three colonels. Brief for Appellants at 7. We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of a "competent tribunal" within the meaning of Army Regulation 190-8.

* * *

For the reasons stated above, the judgment of the district court is reversed.

So ordered.

WILLIAMS, *Senior Circuit Judge*, concurring: I concur in all aspects of the court's opinion except for the conclusion that Common Article 3 does not apply to the United States's conduct toward al Qaeda personnel captured in the conflict in

Afghanistan. Maj. Op. 15-16. Because I agree that the Geneva Convention is not enforceable in courts of the United States, and that any claims under Common Article 3 should be deferred until proceedings against Hamdan are finished, I fully agree with the court's judgment.

* * *

There is, I believe, a fundamental logic to the Convention's provisions on its application. Article 2 (¶ 1) covers armed conflicts between two or more contracting parties. Article 2 (¶ 3) makes clear that in a multi-party conflict, where any two or more signatories are on opposite sides, those parties "are bound by [the Convention] in their mutual relations"--but not (by implication) vis-à-vis any non- signatory. And as the court points out, Maj. Op. at 14, under Article 2 (¶ 3) even a non-signatory "Power" is entitled to the benefits of the Convention, as against a signatory adversary, if it "accepts and applies" its provisions.

Non-state actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (¶ 3) to secure protection by complying with the C onvention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, the signatory

is bound to Common Article 3's modest requirements of "humane[]" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."

I assume that our conflicts with the Taliban and al Qaeda are distinct, and I agree with the court that in reading the Convention we owe the President's construction "great weight." Maj. Op. at 15. But I believe the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5393

SALIM AHMED HAMDAN,
APPELLEE

v.

DONALD H. RUMSFELD, UNITED STATES SECRETARY OF DEFENSE, ET AL,
APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(04CV01519)

July 15, 2005

ORDER

It is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk
BY: Michael C. McGrail, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1519 (JR)

SALIM AHMED HAMDAN, PLAINTIFF

v.

DONALD H. RUMSFELD, DEFENDANT.

Nov. 8, 2004.

Before: ROBERTSON, District Judge.

MEMORANDUM OPINION

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. Because Hamdan has not been determined by a competent tribunal to be an offender triable under the law of war, 10 U.S.C. § 821, and because in any event the procedures established for the Military Commission by the President's order are "contrary to or inconsistent" with those applicable to courts-martial, 10 U.S.C. § 836, Hamdan's petition will be **granted** in part. The government's motion will be **denied**. The reasons for these rulings are set forth below.

BACKGROUND

Hamdan was captured in Afghanistan in late 2001, during a time of hostilities in that country that followed the terrorist attacks in the United States on September 11, 2001

mounted by al Qaeda, a terrorist group harbored in Afghanistan. He was detained by American military forces and transferred sometime in 2002 to the detention facility set up by the Defense Department at Guantanamo Bay Naval Base, Cuba. On July 3, 2003, acting pursuant to the Military Order he had issued on November 13, 2001,[1] and finding "that there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States," the President designated Hamdan for trial by military commission. Press Release, Dep't of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), http://www.defenselink.mil/releases/2003/nr20030703-0173.html. In December 2003, Hamdan was placed in a part of the Guantanamo Bay facility known as Camp Echo, where he was held in isolation. On December 18, 2003, military counsel was appointed for him. On February 12, 2004, Hamdan's counsel filed a demand for charges and speedy trial under Article 10 of the Uniform Code of Military Justice. On February 23, 2004, the legal advisor to the Appointing Authority[2] ruled that the UCMJ did not apply to Hamdan's detention. On April 6, 2004, in the United States District Court for the Western District of Washington, Hamdan's counsel filed the petition for mandamus or habeas corpus that is now before this court. On July 9, 2004, Hamdan was formally charged with conspiracy to commit the following offenses: "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." Dep't of Defense, Military Commission List of Charges for Salim

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[1] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

[2] The Department of Defense has implemented the President's Military Order of November 3, 2001 with a series of Military Commission Orders, Instructions, and other documents. *See generally* Dep't of Defense, Military Commissions (providing extensive links to background materials on the Military Commissions), *at* http://www.defenselink.mil/news/commissions.html. The Secretary of Defense may designate an "Appointing Authority" to issue orders establishing and regulating military commissions. Military Commission Order No. 1 (March 21, 2002), C.F.R. § 9.2, http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Secretary Rumsfeld designated John D. Altenburg, Jr. as Appointing Authority. Press Release, Dep't of Defense, Appointing Authority Decision Made (December 30, 2003), http://www.defenselink.mil/releases/2003/nr20031230-0820.html.

Ahmed Hamdan, http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf . Following the Supreme Court's decision on June 28, 2004, that federal district courts have jurisdiction of habeas petitions filed by Guantanamo Bay detainees, *Rasul v. Bush*, 124 S. Ct. 2686, 159 L.Ed.2d 548 (2004), and the Ninth Circuit's decision on July 8, 2004, that all such cases should be heard in the District of the District of Columbia, *Gherebi v. Bush*, 374 F.3d 727 (9th Cir.2004), the case was transferred here, where it was docketed on September 2, 2004.[3] Oral argument was held on October 25, 2004.

Hamdan's petition is stated in eight counts. It alleges the denial of Hamdan's speedy trial rights in violation of Article 10 of the Uniform Code of Military Justice, 10 U.S.C. § 810 (count 1); challenges the nature and length of Hamdan's pretrial detention as a violation of the Third Geneva Convention (count 2) and of Common Article 3 of the Geneva Conventions (count 3); challenges the order establishing the Military Commission as a violation of the separation of powers doctrine (count 4) and as purporting to invest the Military Commission with authority that exceeds the law of war (count 7); challenges the creation of the Military Commission as a violation of the equal protection guarantees of the Fifth Amendment (count 5) and of 42 U.S.C. § 1981 (count 6); and argues that the Military Order does not, on its face, apply to Hamdan (count 8).

Although Judge Lasnik (W.D.Wash.) ordered the respondents to file a "return," Order Granting Motion to Hold Petition in Abeyance (W.D.Wash. No. 04-0777) (May 11, 2004), and although the motion to dismiss now before this court is styled a "consolidated return to petition and memorandum of law in support of cross-motion to dismiss," no formal show cause order has issued, nor have the respondents ever filed a factual response to Hamdan's allegations. An order issued October 4, 2004 [Dkt # 26] by Judge Joyce Hens Green, who is coordinating and managing all of the Guantanamo Bay cases in this court, provided that "[r]espondents are not required ... to file a response

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[3] Hamdan's counsel, Charles Swift, initially filed the petition in this case in his own name as Hamdan's next friend. The government challenged Swift's standing to do so. At a conference on September 14, 2004, the petition was amended, by consent and *nunc pro tunc*, to be in Hamdan's name only.

addressing enemy combatant status issues ... or a factual return providing the factual basis for petitioner's detention as an enemy combatant, pending further order of the Court."[4] The absence of a factual return is of no moment, however. The issues before me will be resolved as a matter of law. The only three facts that are necessary to my disposition of the petition for habeas corpus and of the cross-motion to dismiss are that Hamdan was captured in Afghanistan during hostilities after the 9/11 attacks, that he has asserted his entitlement to prisoner-of-war status under the Third Geneva Convention, and that the government has not convened a competent tribunal to determine whether Hamdan is entitled to such status. All of those propositions appear to be undisputed.

ANALYSIS

1. Abstention is neither required nor appropriate.

The well-established doctrine that federal courts will "normally not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted," *Schlesinger v. Councilman*, 420 U.S. 738 (1975), is not applicable here. *Councilman* involved a court-martial, not a military commission. Its holding is that, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention ...." *Id.* at 758. In reaching that conclusion, the Court found it necessary to distinguish its previous decisions in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (civilian ex-serviceman not triable by court-martial for offense committed while in service), *Reid v. Covert*, 354 U.S. 1 (1957) (civilian dependent not triable by court-martial for murder of service member husband overseas in peacetime), and *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian employees of armed forces overseas not subject to court-martial jurisdiction for noncapital offenses), none of which required exhaustion. The *Councilman* Court also repeated its observation in *Noyd v. Bond*, 395 U.S. 683, 696 n. 8 (1969),

[4] This order was issued only for the instant case, because briefing of these motions was nearly complete and the issues they raised did not require factual returns. Factual returns must be filed in all of the other Guantanamo detainee cases pending in this court.

that it is "especially unfair to require exhaustion ... when the complainants raised substantial arguments denying the right of the military to try them at all." A jurisdictional argument is just what Hamdan present here.

Controlling Circuit precedent is found in *New v. Cohen*, 129 F.3d 639, 644 (D.C.Cir.1997). In that case, following the Supreme Court's decision in *Parisi v. Davidson*, 405 U.S. 34 (1972), the Court of Appeals noted that, although the abstention rule is often "'framed in terms of 'exhaustion' it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems.'" *Id.* at 642, (quoting *Parisi*, 405 U.S. at 40).

None of the policy factors identified by the Supreme Court as supporting the doctrine of comity is applicable here. *See Parisi*, 405 U.S. at 41, *discussed in New*, 129 F.3d at 643. In the context of this case, according comity to a military tribunal would not "aid[ ] the military judiciary in its task of maintaining order and discipline in the armed services," or "eliminate [ ] needless friction between the federal civilian and military judicial systems," nor does it deny "due respect to the autonomous military judicial system created by Congress," because, whatever else can be said about the Military Commission established under the President's Military Order, it is not autonomous, and it was not created by Congress. *Parisi*, 405 U.S. at 40.

The *New* case identifies an exception to the exhaustion rule that it characterizes as "quite simple: a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *New*, 129 F.3d at 644. That rule, squarely based on the Supreme Court's opinions in *McElroy*, *Reed*, and *Toth*, *supra*, applies here. Even *Councilman* supports the proposition that a district court should at least determine whether the petitioner has "'raised substantial arguments denying the right of the military to try [him] at all.'" 420 U.S. at 763 (quoting *Noyd v. Bond*, 395 U.S. at 696 n. 8). Having done so, and having considered Hamdan's arguments that he is not triable by military commission at all, I conclude that abstention is neither required nor appropriate as to the issues resolved by this opinion.

2. No proper determination has been made that Hamdan is an offender triable by military tribunal under the law of war.

a. The President may establish military commissions only for offenders or offenses triable by military tribunal under the law of war.

The major premise of the government's argument that the President has untrammeled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies, *Ex parte Quirin*, 317 U.S. 1 (1942), *Application of Yamashita*, 327 U.S. 1 (1946), *and Madsen v. Kinsella*, 343 U.S. 341 (1952), has so held. In *Quirin* the Supreme Court located the power in Article I, § 8, emphasizing the President's *executive* power as commander-in-chief "to wage war which *Congress* has declared, and to carry into effect all laws passed by *Congress* for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Quirin*, 317 U.S. at 10 (emphasis added). *Quirin* stands for the proposition that the authority to appoint military commissions is found, not in the inherent power of the presidency, but in the Articles of War (a predecessor of the Uniform Code of Military Justice) by which *Congress* provided rules for the government of the army. *Id.* Thus, Congress provided for the trial by courts-martial of members of the armed forces and specific classes of persons associated with or serving with the army, *id.*, and "the *Articles* [*of War*] also recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." *Id.* The President's authority to prescribe procedures for military commissions was conferred by Articles 38 and 46 of the Articles of War. *Id.* The *Quirin* Court sustained the President's order creating a military commission, because "[b]y his Order creating the ... Commission [the President] has undertaken to exercise the authority conferred upon him by *Congress* ...." *Id.* at 11.

This sentence continues with the words "... and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which

may constitutionally be performed by the military arm of the nation in time of war." *Id.* at 11. That dangling idea is not explained--in *Quirin* or in later cases. The Court expressly found it unnecessary in *Quirin* "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Id.*

In *Yamashita,* the Supreme Court noted that it had "had occasion [in *Quirin*] to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war," *Yamashita,* at 327 U.S. at 7, and noted:

> [W]e there pointed out that *Congress,* in the exercise of the power conferred upon it by Article I, § 8 Cl. 10 of the Constitution to 'define and punish ... Offenses against the Law of Nations ...,' of which the law of war is a part, had by the Articles of War [citation omitted] recognized the 'military commission' appointed by military command as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 7 (emphasis added). Further on, the Court noted:

> We further pointed out that *Congress,* by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be

> included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties."

Id. at 7-8 (emphasis added). And again:

> *Congress*, in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 16 (emphasis added). *Yamashita* concluded that, by giving "sanction ... to any use of the military commission contemplated by the common law of war," *Congress* "preserve[d] their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War]...." *Id.* at 20.

What was then Article 15 of the Articles of War is now Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821. It provides:

> **The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.**

Quirin and *Yamashita* make it clear that Article 21 represents Congressional approval of the historical, traditional, non-

statutory military commission. The language of that approval, however, does not extend past "offenders or offenses that by statute or by the law of war may be tried by military commissions ...." 10 U.S.C. § 821.

Any additional jurisdiction for military commissions would have to come from some inherent executive authority that *Quirin, Yamashita,* and *Madsen* neither define nor directly support. If the President does have inherent power in this area, it is quite limited. Congress has the power to amend those limits and could do so tomorrow. Were the President to act outside the limits now set for military commissions by Article 21, however, his actions would fall into the most restricted category of cases identified by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952), in which "the President takes measures incompatible with the expressed or implied will of Congress," and in which the President's power is "at its lowest ebb."[5]

b. The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt.

> "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

This language is from *Quirin,* 317 U.S. at 27-28. The United States has ratified the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the Third Geneva Convention). Afghanistan is a party to the Geneva Conventions.[6] The Third Geneva Convention is acknowledged to be part of the law of war, 10/25/04 Tr. at 55; Military Commission Instruction No. 2, § (5)(G) (Apr. 30, 2003); 32 C.F.R. § 11.5(g), http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf. It is

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[5] For further development of this argument, see Brief Amici Curiae of Sixteen Law Professors at 9-13.

[6] *See* International Committee of the Red Cross, Treaty Database, *at* http://www.icrc.org/ihl.

applicable by its terms in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Third Geneva Convention, art. 2. That language covers the hostilities in Afghanistan that were ongoing in late 2001, when Hamdan was captured there. If Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 for the rule that requires his habeas petition to be granted:

> **A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.**[7]

The Military Commission is not such a court. Its procedures are not such procedures.

The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not to prisoner-of-war status, and that in any event the protections of the Third Geneva Convention are not enforceable by way of habeas corpus.

(1) The government's first argument that the Third Geneva Convention does not protect Hamdan asserts that Hamdan was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a "separate" conflict with al Qaeda. That argument is rejected. The government apparently bases the argument on a Presidential "finding" that it claims is "not reviewable." *See* Motion to Dismiss at 33, *Hicks v. Bush* (D.D.C. No. 02-00299) (October 14, 2004). The finding is set forth in Memorandum from the President, to the Vice President *et al.*, Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), http://

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[7] *See* Brief Amici Curiae of Sixteen Law Professors at 28-30.

www.library.law.pace.edu/research/020207_bushmemo.pdf, stating that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees captured in Afghanistan, because al Qaeda is not a state party to the Geneva Conventions. Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary, *see* Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 Am. J. Int'l. L. 345, 349 (2002) (conflict in Afghanistan was international armed conflict in which Taliban and al Qaeda joined forces against U.S. and its Afghan allies)), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. *See* Amicus Brief of General David M. Brahms (ret.), Admiral Lee F. Gunn (ret.), Admiral John D. Hutson (ret.), General Richard O'Meara (ret.) (Generals and Admirals Amicus Brief) at 17 (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President ¶ 3 (Feb. 2, 2002), http://www.fas.org/sgp/othergov/taft.pdf). Thus at some level--whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3, *see infra* note 13--the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.

(2) The government next argues that, even if the Third Geneva Convention might theoretically apply to anyone captured in the Afghanistan theater, members of al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the Third Geneva Convention--they do not carry arms openly and operate under the laws and customs of war. Gov't Resp. at 35. *See also* The White House, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html. We know this, the government argues, because the President himself has determined that Hamdan was a member of al Qaeda or otherwise involved in terrorism against the United States. *Id.* Presidential determinations in this area, the government argues, are due "extraordinary deference."

10/25/04 Tr. at 38. Moreover (as the court was advised for the first time at oral argument on October 25, 2004) a Combatant Status Review Tribunal (CSRT) found, after a hearing on October 3, 2004, that Hamdan has the status of an enemy combatant "as either a member of or affiliated with Al Qaeda." 10/25/04 Tr. at 12.

Article 5 of the Third Geneva Convention provides:

> **Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.**

This provision has been implemented and confirmed by Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, http://www.army.mil/usapa/epubs/pdf/r190_8.pdf., Hamdan has asserted his entitlement to POW status, and the Army's regulations provide that whenever a detainee makes such a claim his status is "in doubt." Army Regulation 190-8, § 1-6(a); *Hamdi,* 124 S. Ct. at 2658 (Souter, J., concurring). The Army's regulation is in keeping with general international understandings of the meaning of Article 5. *See generally* Generals and Admirals Amicus Brief at 18-22.

Thus the government's position that no doubt has arisen as to Hamdan's status does not withstand scrutiny, and neither does the government's position that, if a hearing is required by Army regulations, "it was provided," 10/25/04 Tr. at 40. There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in *Hamdi, supra,* to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention. Memorandum From Deputy Secretary of Defense, to

Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 3 (July 7, 2003), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; *see also* Memorandum From Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions, *see* 10/25/04 Tr. at 37. The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

(3) The government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, is also rejected.[8] It is

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[8] Article 3 of the Third Geneva Convention is called "Common Article 3" because it is common to all four of the 1949 Geneva Conventions.

It provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be found to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be sickness, wounds, detention, or any other cause, shall in all circumstances by treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court

universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies "international human norms," *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1351 (N.D.Ga.2002), and that it sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic*, 70 F.3d at 232, 243 (2d Cir.1995). The International Court of Justice has stated it plainly: "There is no doubt that, in the event of international armed conflicts ... [the rules articulated in Common Article 3] ... constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'." *Nicaragua v. United States*, 1986 I.C.J. 14, 114 (Judgment of June 27). The court went on to say that, "[b]ecause the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether ... [the actions alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or the other category of conflict."[9] *Id.*

The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. *Amici* remind us of the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to a Somali warlord. The United States demanded assurances that Durant would be treated consistently with protections afforded by the Convention, even though, if the Convention were applied as narrowly as the government now seeks to apply it to

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affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be commected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[9] *See also* Brief Amici of Sixteen Law Professors at 33 n.32.

Hamdan, "Durant's captors would not be bound to follow the convention because they were not a state." Neil McDonald & Scott Sullivan, Rational Interpretation in Irrational Times: The Third Geneva Convention and "War On Terror", 44 Harv. Int'l. L.J. 301, 310 (2003). Examples of the way other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies are set forth in Lawyers Committee for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States, at 77-80 (2003).

(4) The government's putative trump card is that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court--that, in effect, Hamdan has failed to state a claim upon which relief can be granted--because the Third Geneva Convention is not "self-executing" and does not give rise to a private cause of action.

As an initial matter, it should be noted Hamdan has not asserted a "private right of action" under the Third Geneva Convention. The Convention is implicated in this case by operation of the statute that limits trials by military tribunal to "offenders ... triable under the law of war." 10 U.S.C. § 821. The government's argument thus amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation.

Treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2. United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." *The Paquete Habana*, 175 U.S. 677, 708 (1900); Restatement (Third) of the Foreign Relations Law of the United States § 111. A treaty is "non-self-executing" if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if implementing legislation is constitutionally required. *Id.* at § 111(4). The controlling law in this Circuit on the subject of whether or not treaties are self-executing is *Diggs v. Richardson*, 555 F.2d 848 (D.C.Cir.1976), a suit to prohibit the importation of seal furs from Namibia, brought by a citizen plaintiff who sought to compel United States

government compliance with a United Nations Security Council resolution calling on member states to have no dealings with South Africa. The decision in that case instructs a court interpreting a treaty to look to the intent of the signatory parties as manifested by the language of the treaty and, if the language is uncertain, then to look to the circumstances surrounding execution of the treaty. *Id.* at 851. *Diggs* relies on the *Head Money Cases,* 112 U.S. 580 (1884), which established the proposition that a "treaty is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Id.* at 598. The Court in *Diggs* concluded that the provisions of the Security Council resolution were not addressed to the judicial branch of government, that they did not by their terms confer rights on individuals, and that instead the resolution clearly called upon governments to take action. *Diggs,* 555 F.2d at 851.

The Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined. Moreover, as petitioner and several of the *amici* have pointed out, *see, e.g.,* Pet'r's Mem. Supp. of Pet. at 39 n.11, it is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, if any, was deemed "required to give effect to the provisions contained in the four conventions," S.Rep. No. 84-9, at 30 (1955), and found that only four provisions required implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case, *supra,* were not among them. What did require implementing legislation were Articles 129 and 130, providing for additional criminal penalties to be imposed upon those who engaged in "grave" violations of the Conventions, such as torture, medical experiments, or "willful" denial of Convention protections, none of which is involved here. Third Geneva Convention, art. 130. Judge Bork must have had those provisions in mind, together with Congress' response in enacting the War Crimes Act, 18 U.S.C. § 2441, when he found that the Third Geneva Convention was not self-executing because it required "implementing legislation." *Tel-Oren v. Libyan Arab Republic. et al.,* 726 F.2d 774, 809 (D.C.Cir.1984) (Bork, J., concurring). That opinion is one of three written by a three-judge panel, none of which was joined by any other member

of the panel. It is not Circuit precedent and it is, I respectfully suggest, erroneous. "Some provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h.[10]

* * *

Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.[11] I further conclude that it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections of the Third Geneva Convention as a prisoner of war and that accordingly he must be given those protections unless and until the "competent tribunal" referred to in Article 5 concludes otherwise. It follows from those conclusions that Hamdan may not be tried for the war crimes he is charged with except by a court-martial duly convened under the Uniform Code of Military Justice.

c. Abstention is appropriate with respect to Hamdan's rights under Common Article 3.

There is an argument that, even if Hamdan does not have prisoner-of-war status, Common Article 3 would be violated by trying him for his alleged war crimes in this Military Commission. Abstention is appropriate, and perhaps required, on that question, because, unlike Article 102, which

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[10] The observation in *Al-Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003), that the Third Geneva Convention is not self-executing merely relies on the reasons stated by Judge Bork in *Tel-Oren*, 726 F.2d at 809. Since that observation was not essential to the outcome in *Al-Odah*, and since in any event *Al-Odah* was reversed by the Supreme Court, I am not bound by it.

[11] Hamdan is a citizen of Yemen. The government has refused permission for Yemeni diplomats to visit Hamdan at Guantanamo Bay. Decl. of Lieutenant Commander Charles Swift at 4 (May 3, 2004). It ill behooves the government to argue that enforcement of the Geneva Convention is only to be had through diplomatic channels.

unmistakably mandates trial of POW's only by general court-martial and thus implicates the jurisdiction of the Military Commission, the Common Article 3 requirement of trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed, term-of-art meaning. A substantial number of rights and procedures conferred by the UCMJ are missing from the Military Commission's rules. *See infra* note 12; Generals and Admirals Amicus Brief at 24. I am aware of no authority that defines the word "guarantees" in Common Article 3 to mean that all of these rights must be guaranteed in advance of trial. Only Hamdan's right to be present at every phase of his trial and to see all the evidence admitted against him is of immediate pretrial concern. That right is addressed in the next section of this opinion.

3. In at least one critical respect, the procedures of the Military Commission are fatally contrary to or inconsistent with those of the Uniform Code of Military Justice.

In most respects, the procedures established for the Military Commission at Guantanamo under the President's order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence. The rules laid down by Military Commission Order No. 1, 32 C.F.R. § 9.3, provide that the defendant shall have appointed military counsel, that he may within reason choose to replace "detailed" counsel with another military officer who is a judge advocate if such officer is available, that he may retain a civilian attorney if he can afford it, that he must receive a copy of the charges in a language that he understands, that he will be presumed innocent until proven guilty, that proof of guilt must be beyond a reasonable doubt, that he must be provided with the evidence the prosecution intends to introduce at trial and with any exculpatory evidence known to the prosecution, with important exceptions discussed below, that he is not required to testify at trial and that the Commission may not draw an adverse inference from his silence, that he may obtain witnesses and documents for his defense to the extent necessary and reasonably available, that he may present evidence at trial and cross-examine prosecution witnesses, and that he may not be placed in jeopardy twice for any charge as to which a finding has become final. *Id.* at §§ 9.4 and 9.5.

The Military Commission is remarkably different from a court-martial, however, in two important respects. The first has to do with the structure of the reviewing authority after trial; the second, with the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him.[12]

Petitioner's challenge to the first difference is unsuccessful. It is true that the President has made himself, or the Secretary of Defense acting at his direction, the final

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[12] A great many other differences are identified and discussed in David Glazier, Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2015-2020 (2003). Differences include (not an exhaustive list):

Article 16 requires that every court-martial consist of a military judge and no less than five members, as opposed to the Military Commission rules that require only three members. Military Commission Order No. 1 (4)(A); Article 10 of the UCMJ provides a speedy trial right, while the Military Commission rules provide none. Article 13 states that pre-trial detention should not be more rigorous than required to ensure defendant's presence, while the Commission rules contain no such provision and, in fact, Hamdan was held in solitary confinement in Camp Echo for over 10 months. Article 30 states that charges shall be signed by one with personal knowledge of them or who has investigated them. The Military Commission rules include no such requirement. Article 31 provides that the accused must be informed before interrogation of the nature of the accusation, his right not to make any statement, and that statements he makes may be used in proceedings against him, and further provides that statements taken from the accused in violation of these requirements may not be received in evidence at a military proceeding. The Military Commission rules provide that the accused may not be forced to testify at his own trial, but the rule does not "preclude admission of evidence of prior statements or conduct of the Accused." Military Commission Order No. 1(5)(F). Article 33 states that the accused will receive notice of the charges against him within eight days of being arrested or confined unless written reason is given why this is not practicable. The Military Commission rules include no such requirement, and in fact, Hamdan, after being moved to Camp Echo for pre-commission detainment, was not notified of the charges against him for over 6 months. Article 38 provides the accused with certain rights before charges brought against him may be "referred" for trial, which include the right to counsel and the right to present evidence on his behalf. The Military Commission rules provide for no pre-trial referral process at all. Article 41 gives each side one peremptory challenge, while the Military Commission rules provide for none. Article 42 requires all trial participants to take an oath to perform their duties faithfully. The Military Commission rules allow witnesses to testify without taking an oath. Military Commission Order No. 1(6)(D). Article 52 requires three-fourths concurrence to impose a life sentence. The Military Commission rules only require two-thirds concurrence of the members to impose such a sentence. Military Commission Order No. 1(6)(F). Article 26 provides that military judges do not vote on guilt or innocence. Under the Military Commission rules, the Presiding Officer is a voting member of the trial panel. Military Commission Order No. 1(4)(A).

reviewing authority, whereas under the Uniform Code of Military Justice there would be two levels of independent review by members of the Third Branch of government--an appeal to the Court of Appeals for the Armed Forces, whose active bench consists of five civilian judges, and possible review by the Supreme Court on writ of *certiorari*. The President has, however, established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel finds an error of law, return the case for further proceedings. The President has appointed to that panel some of the most distinguished civilian lawyers in the country (who may receive temporary commissions to fulfill the requirement that they be "officers," *see* Military Commission Order No. 1(6)(H); 32 C.F.R. 9.6(h)).[13] And, as for the President's naming himself or the Secretary of Defense as the final reviewing authority, that, after all, is what a military commission is. If Hamdan is triable by any military tribunal, the fact that final review of a finding of guilt would reside in the President or his designee is not "contrary to or inconsistent with" the UCMJ.

The second difference between the procedures adopted for the Military Commission and those applicable in a court-martial convened under the Uniform Code of Military Justice is far more troubling. That difference lies in the treatment of information that is classified; information that is otherwise "protected"; or information that might implicate the physical safety of participants, including witnesses, or the integrity of intelligence and law enforcement sources and methods, or "other national security interests." *See* Military Commission Order No. 1(6)(B)(3); 32 C.F.R. § 9.6(b). Under the Secretary of Defense's regulations, the Military Commission must "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." *Id.* Detailed military defense counsel may not be excluded from proceedings, nor may evidence be received that has not been presented to detailed defense counsel,

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[13] Griffin B. Bell, a former United States Circuit Judge and Attorney General; William T. Coleman, Jr., a former Secretary of Transportation; Edward George Biester, Jr., a former Congressman, former Pennsylvania Attorney General, and current Pennsylvania Judge; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court. *See* Dep't of Defense, Military Commission Biographies, http://www.defenselink.mil/news/Aug2004/commissions_biographies.html.

Military Commission Order No. 1 (6)(B)(3), (6)(D)(5); 32 C.F.R. §§ 9.6(b)(3), (d)(5). *The accused himself may be excluded from proceedings,* however, and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). *See id.*

Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. *See* Military Commission Order No. 1(6)(D); 32 C.F.R. § 9.6(d). The Presiding Officer or the Appointing Authority may receive it in evidence if it meets the "reasonably probative" standard but forbid it to be shown to Hamdan. *See id.* As counsel for Hamdan put it at oral argument, portions of Mr. Hamdan's trial can be conducted "outside his presence. He can be excluded, not for his conduct, [but] because the government doesn't want him to know what's in it. They make a great big deal out of I can be there, but anybody who's practiced trial law, especially criminal law, knows that where you get your cross examination questions from is turning to your client and saying, 'Did that really happen? Is that what happened?' I'm not permitted to do that." 10/25/04 Tr. at 97.

It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia's extensive opinion in his decision this year in *Crawford v. Washington,* 124 S. Ct. 1354 (2004). It is also apparent that the right to trial "in one's presence" is established as a matter of international humanitarian and human rights law.[14] But it is unnecessary to consider

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[14] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14(d)(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 75.4(e). "This includes, at a minimum, all hearings in which the prosecutor participates. *E.g.*, Eur.Ct.H.Rts., *Belziuk v. Poland,* App. No. 00023103/93, Judgment of 25 March 1998, para. 39." Brief Amici Curiae of Louise Doswald-Beck *et al.* at 32-33 n.137. In this country, as Justice Scalia noted in *Crawford v. Washington,* 124 S. Ct. at 1363, the right to be present was held three years after the adoption of the Sixth Amendment to be a rule of common law "founded on natural justice" (quoting from *State v. Webb,* 2 N.C. 104 (1794)).

whether Hamdan can rely on any American constitutional notions of fairness, or whether the nature of these proceedings really is, as counsel asserts, akin to the Star Chamber, 10/25/04 Tr. at 97 (and violative of Common Article 3), because--at least in this critical respect--the rules of the Military Commission are fatally "contrary to or inconsistent with" the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and thus unlawful.

In a general court-martial conducted under the UCMJ, the accused has the right to be present during sessions of the court:

> When the members of a court-martial deliberate or vote, only the members may be present. *All other proceedings,* including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and *shall be in the presence of the accused,* the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.

UCMJ Article 39(b), 10 U.S.C. § 839(b) (emphasis added).

Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836(a), provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be *contrary to or inconsistent with* this chapter. (Emphasis added.)

The government argues for procedural "flexibility" in military commission proceedings, asserting

> that construing Article 36 rigidly to mean that there can be no deviation from the UCMJ ... would have resulted in having virtually all of the UCMJ provisions apply to the military commissions, which would clearly be in conflict with historical practice, as recognized by the Supreme Court, in both *Yamashita* and *Madsen*, and also inconsistent with Congress' intent, as reflected in Articles 21 and 36, and other provisions of the UCMJ that specifically mention commissions when a particular rule applies to them.

10/25/04 Tr. 26-27. But the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial. It proscribes only procedures and modes of proof that are "contrary to or inconsistent with" the UCMJ.[15]

As for the government's reliance on *Yamashita* and *Madsen*: *Yamashita* offers support for the government's position only if developments between 1946 and 2004 are ignored. In 1946, the Supreme Court held that Article 38 of the Articles of War (the predecessor of Article 36 of the UCMJ) did not provide to enemy combatants in military tribunals the procedural protections (in that case, restrictions on the use of depositions) available in courts-martial under the Articles of War. *Yamashita*, 327 U.S. at 18-20. The Court's holding depended upon the fact that General Yamashita, an enemy combatant, was not subject to trial by courts-martial under then Article 2 of the Articles of War (the predecessor to Article 2 of the UCMJ), which conferred courts-martial jurisdiction only over U.S. military personnel and those affiliated with them. *Id.* at 19-20. The Court held that Congress intended to grant court-martial protections within tribunals only to those persons who could be tried

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[15] In *Kangaroo Court or Competent Tribunal?*, *supra* note 14 at 2020-22, the author suggests that one possible reading of this provision would require consistency only with those nine UCMJ articles (of 158 total) that expressly refer to or recite their applicability to military commissions. A review of the articles that contain such references or recitals, however, *see id.* at 2014 n. 23, demonstrates the implausibility of such a reading.

under the laws of war in either courts-martial or tribunals. *See id.* The UCMJ and the 1949 Geneva Conventions had not come into effect in 1946. Article 2 of the UCMJ is now broader than Article 2 of the Articles of War. *See generally* Library of Congress, Index and Legislative History of the UCMJ (1950), http://www.loc.gov/rr/frd/Military_Law/index_legHistory.html. It has been expanded to include as persons subject to court-martial, both prisoners of war, 10 U.S.C. § 802(a)(9), and "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." *Id.* § 802(a)(12). One or both of those new categories undoubtedly applies to petitioner. For this reason, *Yamashita*'s holding now arguably gives more support to petitioner's case than to the government's.[16]

Madsen follows *Yamashita* in its general characterization of military commissions as "our common law war courts" and states that "[n]either their procedure nor their jurisdiction has been prescribed by statute." *Madsen*, 343 U.S. at 346-47. It does not appear that any procedural issue was actually raised in *Madsen*, however, nor were the Geneva Conventions addressed in any way in that case. Madsen was an American citizen, the dependent wife of an Armed Forces member, charged with murdering her husband in the American Zone of Occupied Germany in 1947 and tried there by the United States Court of the Allied High Commission for Germany. Her argument, which the Court rejected, was simply that the jurisdiction of military commissions over civilian offenders and non-military offenses was automatically ended by amendments to the Articles of War enacted in 1916 that extended the jurisdiction of courts-martial to persons accompanying United States forces outside the territorial jurisdiction of the United States. *Id.* at 351-52.

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16 *Yamashita* has been undercut by history in another important respect. The Supreme Court found the guarantee of trial by court-martial for prisoners of war in the 1929 Geneva Convention inapplicable to General Yamashita because it construed that provision as applicable only to prosecutions for acts committed while in the status of prisoner of war. The Third Geneva Convention, adopted after and in light of *Yamashita*, made it clear that the court-martial trial provision applies as well to offenses committed by combatants while combatants. Third Geneva Convention, art. 85. *See also*, Glazier, *supra* note 12 at 2079-80.

Even though *Madsen* presented no procedural issue, the Supreme Court did generally review the procedures applicable to Madsen's trial. A comparison between those procedures and the rules of the Guantanamo Military Commission is not favorable to the government's position here. In *Madsen*, United States Military Government Ordinance No. 2 (the analogue of the Military Commission Order in this case) provided, under "rights of accused":

> Every person accused before a military government court shall be entitled ... to be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.

Id. at 358 n. 24. There was no provision for the exclusion of the accused if classified information was to be introduced.

The government's best argument, drawing on language found in both *Yamashita* and *Madsen*, is that a "common law war court" has been "adapted in each instance to the need that called it forth," 343 U.S. at 347-48 (citing *Yamashita*, 327 U.S. at 18-23). Neither the President in his findings and determinations nor the government in its briefs has explained what "need" calls forth the abandonment of the right Hamdan would have under the UCMJ to be present at every stage of his trial and to confront and cross-examine all witnesses and challenge all evidence brought against him. Presumably the problems of dealing with classified or "protected" information underlie the President's blanket finding that using the regular rules is "not practicable." The military has not found it impracticable to deal with classified material in courts-martial, however. An extensive and elaborate process for dealing with classified material has evolved in the Military Rules of Evidence. Mil. R. Evid. 505; *see* 10/25/04 Tr. 131-32. Alternatives to full disclosure are provided, Mil. R. Evid. 505(i)(4)(D). Ultimately, to be sure, the government has a choice to make, if the presiding military judge determines that alternatives may not be used and the government objects to disclosure of information. At that point, the conflict between the government's need to protect

classified information and the defendant's right to be present becomes irreconcilable, and the only available options are to strike or preclude the testimony of a witness, or declare a mistrial, or find against the government on any issue as to which the evidence is relevant and material to the defense, or dismiss the charges (with or without prejudice), Mil. R. Evid. 505(i)(4)(E). The point is that the rules of the Military Commission resolve that conflict, not in favor of the defendant, but in favor of the government.

Unlike the other procedural problems with the Commission's rules that are discussed elsewhere in this opinion, this one is neither remote nor speculative: Counsel made the unrefuted assertion at oral argument that Hamdan has already been excluded from the *voir dire* process and that "the government's already indicated that for two days of his trial, he won't be there. And they'll put on the evidence at that point." 10/25/04 Tr. 132. Counsel's appropriate concern is not only for the established right of his client to be present at his trial, but also for the adequacy of the defense he can provide to his client. The relationship between the right to be present and the adequacy of defense is recognized by military courts, which have interpreted Article 39 of the UCMJ in the light of Confrontation Clause jurisprudence. The leading Supreme Court case is *Maryland v. Craig*, 497 U.S. 836 (1990) (one-way television viewing of witness in child abuse case permissible under rule of necessity), which noted that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" and that the "elements of confrontation"--"physical presence, oath, cross-examination, and observation of demeanor by the trier of fact," serve among other things to enhance the accuracy of fact-finding by "reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846 (internal citations omitted).

Following *Craig* in a military case involving child abuse, the Court of Appeals for the Armed Forces found that a military judge had misapplied the Supreme Court's holding when he excluded the defendant from the courtroom during a general court-martial:

> There [in *Craig*], the witness was outside the courtroom and the defendant was present. Here, the

> witness was in the courtroom and appellant was excluded. While appellant could observe J's testimony, he could not observe the reactions of the court members or the military judge, and they could not observe his demeanor. He could not communicate with his counsel except through the bailiff, who was not a member of the defense team. We hold that this procedure violated the Sixth Amendment, Article 39, and RCM 804. While *Craig* and [*United States v. Williams*, 37 M.J. 289 (C.M .A.1993)] permit restricting an accused's face-to-face confrontation of a witness, they do not authorize expelling an accused from the courtroom.

United States. v. Daulton, 45 M.J. 212, 219 (C.A.A.F.1996); *see also United States v. Longstreath*, 45 M.J. 366 (C.A.A.F.1996) (defendant separated from witness by television but present in courtroom).[17]

A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present. 10 U.S.C. § 839. A provision that permits the exclusion of the accused from his trial for reasons other than

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[17] The statute Congress enacted after and in light of the *Craig* opinion, 18 U.S.C. § 3509, carefully protects the rights of child victims and witnesses in abuse cases but preserves the right of the accused to be present. Even if a child witness is permitted to testify by videotaped deposition, the accused must be "present" via two-way television, and the defendant must be "provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition." 18 U.S.C. § 3509(b)(2)(B)(iv).

his disruptive behavior or his voluntary absence is indeed directly contrary to the UCMJ's right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.

4. Hamdan's detention claim appears to be moot, and his speedy trial and equal protection claims need not be ruled upon at this time.

Until a few days before the oral argument on Hamdan's petition, his most urgent and striking claim was that he had been unlawfully and inhumanely held in isolation since December 2003 and that such treatment was affecting his mental and psychological health as well as his ability to assist in the preparation of his defense. Late on the Friday afternoon before the oral argument held on Monday, October 25, 2004, the government filed its "notice of a change in circumstances," advising the court that Hamdan had been moved back to Camp Delta--a separate wing of Camp Delta, to be sure, but nevertheless an open-air part of Camp Delta where pre-commission detainees can communicate with each other, exercise, and practice their religion. 10/25/04 Tr. at 11-12. That change in status may not exactly moot Hamdan's claim about his confinement in isolation, which the government is capable of repeating and which has evaded review. The treatment Hamdan may or may not be afforded in the future, however, is not susceptible to review on a writ of habeas corpus.

The second most urgent and most important claim in Hamdan's original petition was his claim of entitlement to the protection of the Uniform Code of Military Justice's speedy trial rule and his assertion that he had been detained more than the maximum 90 days permitted by Article 103 of the Third Geneva Convention. These concerns were more urgent before Hamdan was transferred out of Camp Echo and back to Camp Delta and before the Supreme Court made it clear, in Hamdi, that, whether or not Hamdan has been charged with a crime, he may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant.[18] The UCMJ's speedy trial requirements establish no specific number of days that

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[18] Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court.

will require dismissal of a suit. Article 103 of the Third Geneva Convention does bar pretrial detention exceeding 90 days, but it provides no mechanism or guidance for dealing with violations. The record does not permit a careful analysis of speedy trial issues under the test for the correlative Sixth Amendment right by *Barker v. Wingo*, 407 U.S. 514 (1972). It is well established in any event that the critical element of prejudice is best evaluated post-trial. *U.S. v. MacDonald*, 435 U.S. 850, 858-9 (1978).

It is also unnecessary for me to decide whether, by virtue of his detention at Guantanamo Bay, Hamdan has any rights at all under the United States Constitution or under 42 U.S.C. § 1981.[19]

CONCLUSION

It is now clear, by virtue of the Supreme Court's decision in *Hamdi*, that the detentions of enemy combatants at Guantanamo Bay are not unlawful per se. The granting (in part) of Hamdan's petition for habeas corpus accordingly brings only limited relief. The order that accompanies this opinion provides: (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the Uniform Code of Military Justice; (2) that, unless and until the Military Commission's rule permitting Hamdan's exclusion from commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to UCMJ Article 39, Hamdan's trial before the Military Commission would be unlawful; and (3) that Hamdan must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some reason other than the pending charges against him requires different treatment. Hamdan's remaining claims are in abeyance.

ORDER

For the reasons set forth in the accompanying memorandum opinion it is

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[19] The Supreme Court's recent decision in *Rasul* does little to clarify the Constitutional status of Guantanamo Bay but may contain some hint that non-citizens held at Guantanamo Bay have some Constitutional protection. *See Rasul*, 124 S.Ct. at 2698 n. 15.

ORDERED that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is granted in part. It is

FURTHER ORDERED that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is denied. It is

FURTHER ORDERED that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged. It is

FURTHER ORDERED that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged. It is

FURTHER ORDERED that petitioner be released from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment. And it is

FURTHER ORDERED that petitioner's remaining claims are in abeyance, the Court having abstained from deciding them.

APPENDIX D: Provisions Involved

U.S. Const. Art. I, Section 8 states in part:

The Congress shall have power...to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

U.S. Const. Art. VI states in part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Amend. 14 states in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) states in part

(2)(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

10 U.S.C. Section 802 states in part:

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it...

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial....

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

10 U.S.C. Section 810 states:

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

10 U.S.C. Section 821 states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. Section 836 states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military

tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

10 U.S.C. Section 839 states:

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of--

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases

in which a military judge has been detailed to the court, the military judge.

10 U.S.C. Section 3037 states:

(a) The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps who are recommended by the Secretary of the Army. An officer appointed as the Judge Advocate General or Assistant Judge Advocate General normally holds office for four years. However, the President may terminate or extend the appointment at any time. If an officer who is so appointed holds a lower regular grade, he shall be appointed in the regular grade of major general.

(b) The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State or Territory, and who have had at least eight years of experience in legal duties as commissioned officers.

(c) The Judge Advocate General, in addition to other duties prescribed by law--

(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;

(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and

(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

18 U.S.C. 242 states in part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien...than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both...

Third Geneva Convention, relative to the Treatment of Prisoners of War (1949)

Article 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples...

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 85

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

Article 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Fourth Geneva Convention, Relative to the Protection of Civilian Persons in Time of War

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

Article 65

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Article 66

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Article 67

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence. They shall take into consideration the fact that the accused is not a national of the Occupying Power.

Article 68

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

Article 70

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for

opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Article 71

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

(a) Description of the accused;

(b) Place of residence or detention;

(c) Specification of the charge or charges (with mention of the penal provisions under which it is brought);

(d) Designation of the court which will hear the case;

(e) Place and date of the first hearing.

Article 72

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

APPENDIX E

FOR OFFICIAL USE ONLY
No. 040004

UNITED STATES

v.

SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/ka/ Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

Approval of Charges And Referral

July 13, 2004

The charge against Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July, 26, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.

s/John D. Altenburg, Jr.
John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/ka/ Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

CHARGE: CONSPIRACY

Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) counsel composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere the can be found and to "plunder their money."

10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS

COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan") in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.

13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:

    a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.

b. From 1996 through 2001, Hamdan: (1) delivered weapons, ammunition or other supplies to al Qaida members and associates; (2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan; (3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Ladan bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and (4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S. Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.

c. On divers [sic] occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the

Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.

d. Between 1996 and November of 2001, Hamdan, on divers [sic] occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5392
[Civ. Action No. 04-1519 (JR)]

SALIM AHMED HAMDAN, Petitioner-Appellee

v.

DONALD H. RUMSFELD, ET AL., Respondents-Appellants.

MOTION FOR EXPEDITION OF APPEAL

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 27, respondents-appellants, Donald H. Rumsfeld, United States Secretary of Defense, et al., hereby move to expedite the above-captioned appeal.

1. On November 8, 2004, the district court in the above-captioned case, granted in part the habeas corpus petition of Salim Ahmed Hamdan. Hamdan is a trained al Qaeda member/affiliate. After joining forces with Osama bin Laden in 1996, Hamdan served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates. He delivered weapons, ammunition or other supplies to al Qaeda members and associates. Hamdan was trained to use rifles, handguns and machine guns at an al Qaeda camp in Afghanistan. *See* Respondents' Cross-Motion to Dismiss, Ex. A (Indictment).

Hamdan was captured as part of the U.S. military operation in Afghanistan in late 2001. In 2002, Hamdan was transferred to the detention facility at the U.S. Naval Base at Guantanamo Bay, Cuba. On July 3, 2003, the President issued a finding that "that there is reason to believe that [Hamdan] was a member of al Qa[e]da or was otherwise involved in terrorism directed against the United States," and

designated Hamdan for trial by military commission. Slip op. 2-3.

Hamdan's counsel filed the petition for mandamus or habeas corpus in federal district court challenging the commission proceedings. Slip op. 4.

2. On November 8, 2004, the district court granted the petition in part. In so ruling, the court overruled the Commander in Chiefs determination that al Qaeda members and affiliates are not covered by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereafter the "Geneva Convention"). The court also effectively overruled the President's determination that al Qaeda was a separate party to the conflict in Afghanistan. Notwithstanding statements of this Court to the contrary, and the Supreme Court's holding that the prior version of the treaty was not self-executing, the district court here proceeded to hold that the Convention was self-executing, and granted Hamdan rights enforceable in federal court. Based on its construction of the Convention and U.S. Army regulations, the court found that Hamdan has the right to be treated as a prisoner of war (until determined otherwise by "a competent authority") and that he could not be tried by the currently constituted military commission for his war crimes. The court went further and held that, even if Hamdan is determined not to be a POW, he can only be tried by a military commission that affords him the full rights a U.S. service member would receive under the Uniform Code of Military Justice. In so holding, the court found that the President lacked the constitutional authority to create the commissions currently in place. Based on this series of erroneous legal rulings, the court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

3. On November 12, 2004, respondents filed a notice of appeal from the district court's November 8 order.

4. An expedited appeal is warranted not only because the district court's order has derailed the ongoing military commission proceedings against a prominent aide to al Qaeda leader Osama bin Laden, but also because, in reaching that result, the court has rendered several legally erroneous rulings with potentially very broad and dangerous

ramifications. These rulings, granting judicially enforceable rights under the Geneva Convention to al Qaeda enemy combatants, and contradicting the important military determinations of the Commander-in-Chief during a time of active armed conflict, represent an unprecedented judicial intrusion into the prerogatives of the President and warrant expedited review by this Court.

a. The district court's ruling that the Geneva Convention provisions at issue are self-executing is both wrong as a matter of law and has substantial implications beyond this case. Finding that those captured during armed conflict have judicially enforceable rights under the Convention opens a veritable Pandora's box where the Executive attempting to protect this nation through the use of military force would become entangled in a morass of litigation, brought by enemy detainees and POWs, about the implementation of the Convention. Such a result would indisputably encumber the President's authority as Commander in Chief. Indeed, it is nearly unimaginable to consider the implications of having permitted the more than 2 million POWs held during WWII the right to enforce Geneva Convention provisions through legal actions filed in the United States.

The district court's primary rationale for finding the Convention to be self-executing is that the treaty protects the rights of individuals (*i.e.*, persons captured or otherwise detained during an armed conflict). That rationale, however, conflicts with the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), which refused to find the International Covenant on Civil and Political Rights ("ICCPR") – which protects individual civil rights -- to be self-executing (*i.e.*, to provide judicially enforceable rights). *Sosa*, 124 S.Ct. at 2767. Other major civil rights and human rights conventions are also not self-executing -- *e.g.*, the International Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

Moreover, the Supreme Court has held that the precursor to the Geneva Convention was not self-executing. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). *See also Holmes v. Laud*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial"). When the President signed and the Senate

ratified the current version of the Convention in 1955, there was no indication that they changed the essential character of the treaty to permit, without any implementing legislation, alleged violations to be enforced by captured enemy forces through the captor's judicial system. To the contrary, the terms of the Convention show that vindication of rights under the Treaty is a matter of State-to-State relations, not domestic court resolution. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 468-469 (4th Cir. 2003), *overruled on other grounds*, 124 S. Ct. 2633 (2004).

Thus, it is no accident that over the last fifty years no court of appeals has ever found the Convention to be "self-executing." *See Hamdi*, 316 at 468-469. *See also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randoph, J., concurring), *overruled on other grounds*, 124 S. Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring).

b. The district court's order also effectively overrules the President's determinations that al Qaeda was a separate party to the conflict in Afghanistan and that al Qaeda members/affiliates do not qualify for protection under the Geneva Convention. The district court appears to have decided that, in respect to the military conflict in Afghanistan, al Qaeda and Taliban forces cannot properly be treated as separate entities. The President, however, expressly determined just the opposite: that al Qaeda is a distinct party to the conflict. That decision, made as part of the President's broad authority as Commander in Chief, as well as pursuant to his powers over foreign affairs, is not subject to contradiction by the district court or any other court. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

These determinations were fundamental exercises of the President's authority as Commander in Chief. The district court's decision to treat those determinations as legal nullities and to grant Convention rights to al Qaeda members/affiliates is in itself a substantial injury to the President's authority.

c. This appeal also presents an important question of when a district court must abstain until military commission proceedings have reached a point of finality. The district court refused to abstain here, even though, in general, it is

well established that a federal court must abstain from hearing a challenge to a military commission proceeding until the completion of the proceedings. *See Schlesinger v. Councilman*, 420 U.S 738 (1975); *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997). Although it is true that there are some cases in which courts have not required exhaustion of military remedies before considering challenges to the jurisdiction of military courts, those cases involved *U.S. citizens* who were indisputably civilians and were charged with offenses unrelated to any armed conflict. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

The military commission proceedings against Hamdan were ongoing with motions pending and a trial scheduled. The district court's order disrupting these important proceedings against an al Qaeda enemy combatant charged with war crimes is directly contrary to the Supreme Court's admonition in *Councilman* that the judiciary should not generally interfere with ongoing military tribunal proceedings. As in *Councilman*, the ultimate ruling of the military commission process here will "remain subject in proper cases to collateral impeachment," 420 U.S. at 738, and there is no irreparable harm to Hamdan requiring court intervention at this juncture.

Thus, there was no proper basis for the district court to intervene and to prevent the President from exercising his constitutional authority to capture and try war criminals during this country's war against terrorism. Expedited review by this Court is critical in order to minimize the unwarranted delay caused by the district court's order in the conduct of these important military commission proceedings.

d. The appeal also presents the critical issue of whether the President has inherent authority to create-military commissions to try enemy combatants. The district court erred not only in concluding that 10 U.S.C. 821 does not reflect congressional approval of the exercise of the President's war powers here, but also erred in concluding that the Constitution does not confer authority upon the President to establish military tribunals. *See* Slip Op. 8-13. Under Article II, the President is vested with broad authority as "Commander in Chief' to carry out military operations. The Commander-in-Chief power is the "[f]irst of the enumerated powers of the President * * * * [a]nd includes all that is

necessary and proper for carrying [it] into execution." *Eisentrager*, 339 U.S. at 788. An essential "incident to the conduct of war is the adoption of measures by the military commander * * * to seize and subject to disciplinary measures those enemies who * * * have violated the law of war." *Yamashita v. Styer*, 327 U.S. 1, 11 (1946)

The district court's order rejecting this basic and necessary Executive power as Commander in Chief is plainly erroneous and warrants swift appellate review.

5. Given these serious legal errors and the significant harms that the district court's ruling could potentially cause, expedition of this appeal is clearly warranted.[1]

The Government proposes an expedited schedule under which appellants' brief would be due 21 days after this Court's order granting this motion, appellee's brief be due 21 days thereafter, and appellants' reply 10 days after that. The Government further requests that this Court schedule oral argument as soon as possible after the close of the briefing.

6. Government Counsel has consulted with counsel for Hamdan, and they have refused to consent to this motion and they reserve the right to oppose it.

CONCLUSION

For the foregoing reasons, this Court should expedite the consideration of this appeal.

PETER KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

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[1] The considerations we advance in support of expedition could well support a stay of the district court's order pending appeal. Although we are not seeking a stay in this motion, the Government may need to seek that additional relief, especially given the uncertain implications of the district court's POW analysis. Regardless of whether a stay is sought or ordered, expedition of the appeal is warranted for the reasons set forth herein.

s/Douglas N. Letter
DOUGLAS N. LETTER

s/Robert M. Loeb
ROBERT M. LOEB
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Civil Division, Room 7268
Department of Justice
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November 16, 2004

APPENDIX G

FROM COL. PETER E. BROWNBACK, NOVEMBER 8, 2004

The Commission has carefully considered the order of the district court for the District of Columbia. Proceedings in the case of US v. Hamdan are abated until further notice.

FOR THE COMMISSION

s/ Peter E. Brownback
Peter E. Brownback III
COL, JA, USA
Presiding Officer

APPENDIX H

UNITED STATES NAVAL STATION:
GUANTANAMO BAY, CUBA:

AFFIDAVIT

I, Salim Ahmed Salim Hamdan, having been duly sworn, states and deposes as follows:

My name is Salim Ahmed Salim Hamdan and I am a Yemeni citizen. I have been known by the name Saqr. I was born in the village of Khoreiba in the governate of Hadhramout in approximately 1969. In 1980, I moved to Makula, where I lived with relatives and worked odd jobs in the city from age 10 until the age of about 20. From the age of 20 I moved to the capital of Yemen, Sa'ana, where I continued to work and seek better employment opportunities, I was unable to find permanent employment, but continued to work odd jobs. In 1996, I was approached by Ali Al-Yafi who was seeking men to aid Muslims struggling against the communists in Tajikistan. After several meetings I agreed to go with him to Tajikistan to aid my fellow Muslims in their struggle. I traveled to Pakistan and then to Afghanistan where I met with other Muslims who were going to Tajikistan. We traveled by plane then by car and then by foot until we got to Badashaw, the forces at Tajikistan wouldn't allow us to go further, and the weather in the mountains was bad, we turned around and left for Kabul. In Kabul, I told Muhammad, that I wanted to return to Yemen. He asked me why. He said there was no work in Yemen and I should stay here, because he has a job for me. He told me he knew of a job as a driver for me. He took me to a farm in Jalalabad, where I met Osama Bin Laden. Osama Bin Laden offered me a job as a driver on a farm he owned, bringing Afghanis workers from the local village to work and back again. After about seven (7) months Osama Bin Laden began to have me drive him to various places. During the period that I worked for Osama Bin Laden, I traveled back to Yemen twice, the first time in 1998 was to get married, then in August 2000, I went back to Yemen to attend my brother-in-law's wedding and to attend the pilgrimage to the Hajj. In February 2001, I returned to Afghanistan with my wife to continue work as a driver. I was still working as a driver in October 2001, when the Northern

Alliance with American support began its offensive. The last time I was with Bin Laden was in Kabul. I heard that the Northern Alliance was attacking Kandahar where my wife and daughter were living and I feared for my wife. I decided to return to them and I asked him [Bin Laden] if I could go to Kandahar but regardless of his response, affirmative or negative, I was going to my wife. I was worried about their safety and I decided to take them to Pakistan. I decided to borrow a car to drive my family to Pakistan. After I had taken my family to Pakistan, I tried to return to Afghanistan to return the car to its owner and to return to my house to sell my belongings to get money in order to return with my family to Yemen. But while trying to return, I was stopped by soldiers loyal to the former king Zahir Shah of Afghanistan, who were looking for Arabs to sell to American forces. When they stopped me they had already taken another Arab who they shot and killed. I tried to flee, but I failed and they captured me again. They tied my hands and feet behind me like an animal with electrical wire and they tied me so tight that the wire cut me. They took me to a house. After a day, I was taken to another house for seven (7) days where I was questioned by a man in a military uniform, who spoke Arabic and said he was an American. The Afghan soldiers told me they had gotten $5,000.00 from the Americans for me, one of the guards who was at the house wanted to see dollars. When the guard showed the money, I saw it too.

While in Afghanistan, I helped and cooperated with the Americans in every way. Despite the fact that I cooperated with the Americans, I was physically abused. I have a bad back from work in Yemen. I told my investigators of this condition but was transported in positions that caused me physical agony in my back. I was dressed in only bright blue overalls in sub-freezing temperatures and was very cold. I was made to sit motionless on benches with other prisoners for days. When I did not know the answers to the investigators questions, the soldiers would strike me with their fists and kick me with their feet, after the investigator left, before they took me back with the other prisoners. When I took them places I had driven Osama Bin Laden, they would threaten me with death, torture or prison when I did not know the answers to their questions. One of their methods to threaten was to put a pistol on the table in front of me and show me the gun and asked, "What do you think?" I

went with them to places that Bin Laden lived and where he traveled.

In June 2002, I was flown to Guantanamo Bay, Cuba. In Guantanamo Bay, Cuba, I was put in a large prison with many other men. I was held in a single cell in a cellblock of 48 men. These cells were open to the air and I could talk to the other men. I was given 15 minutes a week of exercise in a 8 meter by 7 meter fenced in area. A Muslim cleric would come and talk to people and I talked with and I could hear the calls to prayer. At Camp Delta, I was questioned by many people from the FBI and Arab police forces. They showed me pictures and asked me to identify the people. On two (2) occasions they allowed me to call my wife on a portable telephone and speak with her and to calm her. I had not heard from her since I left her in Pakistan and I was worried about her. Men from the FBI and investigators from the camp told me that he did not think I had committed any crime and that I am not guilty, but that he wanted me to be a witness against others. He said that if I was willing to be a witness, I could leave Guantanamo Bay and become an American citizen. He let me call my wife again to discuss it. The FBI agent had a written agreement he wanted me to sign. I decided not to because I did not have a lawyer to guarantee that the agreement would be honored. After that I was questioned many times by the FBI and other people.

In December 2003, I was moved from Camp Delta, and put in a new cell, this cell was enclosed in a house, and from that time I have not been permitted to see the sun or hear other people outside the house or talk with other people. I am alone except for the guard in the house. They allow me to exercise three times per week but only at night and not in the day. They gave me the Quran only but not other books. When I asked why I had been moved to this place no one told me anything until I asked for a translator because I do not speak English and the guard does not speak Arabic. The translator is supposed to come twice a week but the translator did not come except when I demanded urgently. He told me that I will have a military trial and will be given a lawyer and I complained that I have medical problems and I asked for a doctor to come check me but he did not come. I have pains in my back and leg and I itch from lack of sunshine. The soldier told me to inform my lawyer when he comes that you asked for a doctor and he did not come. I asked for books from the

library, but was told it was closed. I am alone and I do not talk with anyone in my cell because there is no one else to talk to.

On January 30th, I met LCDR Charles Swift, who told me that he had been assigned to defend me before a military commission. I asked my lawyer what the charges against me were. LCDR Swift told me that no charges against me, but the government sent him a letter that the charges contemplated were conspiracy to commit terrorism. I asked my lawyer why the government had not prepared the charges and when my trial would be.

LCDR Swift told me that the government letter demanded to know whether I would plead guilty to unspecified charges in exchange for a guaranteed sentence. LCDR Swift also told me that in addition to pleading guilty, that I would have to be a witness for the United States as part of the agreement. I do not believe I should plea guilty, because I do not believe I have committed any crime.

Being held in the cell where I am now is very hard, much harder than Camp Delta. One month is like a year here, and I have considered pleading guilty in order to get out of here. I believe that I am a civilian, I have never been a member of Al-Qaeda and I am not a terrorist and I believe I should have a civilian trial, but any trial is better than what I have now. I have asked LCDR Swift to seek a trial as fast as possible and authorized him to act as my next friend in the civilian court, because I have no relatives in the United States. I understand that Professor Neal Kaytal will also represent me. My translator, Mr. Charles Schmitz, prepared this statement in Arabic, which I have read and understand to be the truth. My translator, Mr. Schmitz has prepared an English version of my Arabic hand-written statement and based on his review, I have signed and swear to its authenticity.

Further your affiant sayeth not.

_____

Salim Ahmed Salim Hamdan

Subscribed and sworn before
Me this 9th day of February 2004

JASON E. KREINHOP
Legalman First Class, United States Navy
Notary Public and counsel for the United States
10 U.S.C. 1044a

APPENDIX I

Jess Bravin, *Will Old Rulings Play a Role In Terror Cases?*, Wall St. J., Apr. 7, 2005, at B1

In the annals of law, the case of Masatomo Kikuchi is all but forgotten.

The former Japanese prison guard was tried by the Allies after World War II for war crimes. In 1947, a U.S. military commission, citing the Geneva Conventions and customary international law, convicted him of compelling prisoners of war to practice saluting and other military exercises for as long as 30 minutes when they were tired. His sentence: 12 years of hard labor.

For decades, records of the Kikuchi case and hundreds of other postwar tribunals lay forgotten in archives and government offices around the world. But now they could assume new significance for one of the most contentious aspects of the war on terrorism: the U.S.'s treatment of prisoners.

Hundreds of suspected terrorists and enemy fighters have been captured since the fall of 2001 and housed at Guantanamo Bay, Cuba, and elsewhere. The Bush administration has determined these captives aren't protected by the Geneva Conventions. But the administration has faced a wave of legal challenges to that view, and suffered several defeats so far. Today, government lawyers will ask a federal appeals court in Washington to reverse a November ruling that found the Geneva Convention protects prisoners held at Guantanamo and ordered an immediate halt to military commission proceedings against detainees because they didn't comply with the treaty.

The legal battle is likely to end up at the Supreme Court, and, depending on its outcome, could compel the U.S. to devise a new road map for prisoner treatment. The rulings from the years immediately after World War II lay out the most complete picture available of the way the U.S. viewed treatment of prisoners of war back then, when modern international humanitarian law was laid down. The question is, do these cases apply today?

Critics of the Bush administration's policy on terror-related prisoners argue they do. "These are the foundational

cases," the first to apply international law to questions of prisoner treatment during armed conflict, says David Cohen, a 56-year-old professor of classics and rhetoric at the University of California, Berkeley, who also teaches classes on war crimes. He has spent the last 10 years collecting the documents from archives and government offices, adding millions of pages to existing records and unearthing the case of Mr. Kikuchi.

The records make it clear that after World War II, U.S. military prosecutors and judges set out to establish a precedent barring any prisoner mistreatment, by aggressively pursuing and punishing even comparatively small offenses.

"These things of minor importance are the very things which caused the Allied prisoners of the Japanese so great discomfort," prosecutor Robert Neptune told a military commission in October 1948. Army judges agreed. One wrote, "Extreme brutality or serious injury to the victim is not a necessary element" for guilt.

The files are an "extremely valuable and persuasive authority that has not really figured in the debate so far," says Scott Horton, chairman of the international-law committee for the New York City Bar Association. He and other critics have begun to cite them in some of the dozens of legal challenges to the administration working their way through the courts -- though it remains up to the courts themselves whether to invoke them as precedents.

Neal Katyal, a Georgetown University law professor who represents a Guantanamo prisoner, says the records "show that our own government once took the position that the treatment that current Guantanamo detainees face" amounted to war crimes. Says Mr. Katyal, who is scheduled to argue before the appeals court today, "Can you really say that the laws of war require less now than they did in 1945?"

But David Rivkin, who served as a White House and Justice Department official in the Reagan and first Bush administrations, argues that the cases don't disprove the administration's views of suspected al Qaeda and Taliban fighters. Since they have no right to wage war under existing treaties, they have no rights upon capture, he says.

Historically, such "unlawful" combatants "not only would not get POW status, they were executed on point of capture," he says. Under the "traditional paradigm, if you

were a lawful combatant, you got everything. That has nothing to do with how unlawful combatants were treated."

Mr. Rivkin says the cases are helpful, though, in illustrating certain doctrines, such as "command responsibility," the legal theory under which superior officers can be held accountable for the misdeeds of their troops. In cases in which the U.S. acknowledges that prisoners have been abused, such as at Baghdad's Abu Ghraib prison, only low-ranking personnel have faced prosecution so far.

"I have no doubt that in due course more senior people will be charged," he says. "If we were holding this conversation two years from now and we weren't prosecuting anyone higher up," it would be hard to argue the U.S. was being consistent with its World War II precedents.

One Pentagon legal expert says the World War II-era cases are of uncertain relevance to the treatment of prisoners, because President Bush has determined they do not qualify for international-law protections. "The distinction here is that these [suspected Taliban and al Qaeda fighters] are not members of the military services of a government," the official says.

A Defense Department spokesman declined to comment.

All sides acknowledge that the situation after World War II isn't a precise parallel to today. Many Japanese war criminals clearly were guilty of heinous acts, such as forcing thousands of prisoners of war on death marches, beheading prisoners and presiding over mass starvation. Some of the convicted guards used severe tactics such as beatings and sleep deprivation to make prisoners talk. The charges are far deeper and more wide-ranging than anything the U.S. has been accused of today.

But the archives also make clear that some of the practices employed by the U.S. today resemble those that U.S. military commissions condemned when Americans were on the receiving end. The U.S. considered as war crimes such tactics as solitary confinement, sleep and sensory deprivation, manipulation of meal schedules, forcing men to answer questions while naked or restrained in painful "stress positions," and failing to register prisoners with the International Red Cross. Today, all have been approved or practiced at Guantanamo and other U.S. facilities.

The records, many of them from tribunals held at Yokohama, Japan, between 1946 and 1949, show that many defendants, like Mr. Kikuchi, received long sentences for lesser infractions, in keeping with the U.S.'s aggressive approach to prosecutions. Some of the justifications now offered both by low-level American soldiers and top officials echo those raised, with little success, by Japanese defendants called to account before American courts.

U.S. tribunals dismissed defense arguments that Japanese practices were necessary for disciplinary or interrogation reasons, that American prisoners were treated no worse than Japanese soldiers, that Japan hadn't ratified the Geneva Conventions and wasn't therefore bound by them and that, in any event, many American prisoners had forfeited POW status by bombing cities or committing acts of sabotage.

The U.S. also held senior officials accountable for actions of their underlings; the Tokyo tribunal, for instance, sentenced former Japanese foreign minister Mamoru Shigemitsu to seven years even though he was an acknowledged leader of the Japanese peace faction and had sought to investigate Allied complaints of prisoner mistreatment during the war. The tribunal found punishment warranted because "he should have pressed the matter, if necessary to the point of resigning."

Jess Bravin, *Military Commissions, Then and Now*, Wall St. J. Online, Apr. 7, 2005

During World War II, the American strategic bombing campaign targeted Tokyo and other Japanese cities. The U.S. considered the tactic legitimate, and eventually secured Japan's unconditional surrender by destroying the cities of Hiroshima and Nagasaki with atomic bombs.

But Japan saw the bombing of its cities as the deliberate targeting of civilians--and employed summary proceedings to punish captured American flyers as war criminals. Following the war, American military authorities concluded that treating Americans as war criminals was itself a war crime, because the Japanese procedures didn't meet the due-process standards of international law. At U.S. military commissions convened at Yokohama, Japan, in the late

1940s, U.S. Army officers carefully reviewed the level of due process the enemy had afforded American prisoners, and harshly punished them for falling short of what the U.S. decided was required.

That history may now come back to haunt the Bush administration, as advocates for prisoners held at Guantanamo Bay, Cuba, argue that, like Japan in World War II, the U.S. today is punishing prisoners without affording them sufficient due process.

In November, a federal judge in Washington shut down military commissions the administration convened to try prisoners at Guantanamo Bay, Cuba, finding that they fell short of international legal standards. Today, a federal appeals court in Washington will hear the government's appeal -- and find that the long-forgotten history of the World War II commissions is suddenly at issue.

"Our military prosecuted the Japanese officials who devised specious rationales to deny court-martial protections and 1929 Geneva Convention protections to our captured servicemen tried in Japanese military commissions," says Neal Katyal, a Georgetown University law professor who is representing Salim Hamdan, a Guantanamo prisoner facing trial. "The government today has launched prosecutions at Guantanamo that mirror those Japanese prosecutions, despite the fact that the Geneva Conventions and court-martial protections for defendants have gotten far stronger, instead of weaker, in the years since World War II. That is the essence of our claim before the federal courts."

The current military commission is unlawful, Mr. Katyal argues, because it affords defendants fewer rights than American soldiers receive before courts-martial, in particular by denying defendants the right to confront all witnesses or see all evidence against them.

Mr. Hamdan, a Yemeni captured in Afghanistan after the U.S. invasion in fall, 2001, is accused of conspiracy to commit murder and terrorism and faces a maximum penalty of life in prison. He denies the charges, but acknowledges serving as Osama bin Laden's driver.

The government's primary claim is that courts have no authority to second-guess the treatment of enemy prisoners. But the administration also contends its military commission will offer a fair trial. President Bush's November

2001 order authorizing the commission called for "full and fair" trials, and officials say they have been reviewing the procedures with an eye to making them resemble courts-martial more closely. Nonetheless, the administration maintains that special courts are needed to try international terrorism suspects because of the grave threat they pose to the U.S. Under current rules, commissions can sentence convicts to any term or, on vote of a unanimous seven-member panel, death.

According to the U.S. military's World War II records, Japanese officials also devised special procedures to deal with what they considered an extraordinary threat. American flyers "who do not violate international law will be treated as prisoners of war," but those "suspected of being felonious war criminals" would face Japanese military tribunals. Offenses "subject to military punishment" included "bombing, strafing and other acts of attack aimed at threatening and inflicting casualties on civilians," "damaging and destroying private property which has no military significance" and "any atrocious brutal acts that disregard humanity." The maximum penalty was death by firing squad.

Like the Bush administration's military commissions, the Japanese courts could consider evidence extracted through coercive interrogations. But laws passed by the Japanese Diet and regulations issued by the Imperial Army spelled out procedures intended to ensure that prisoners weren't punished arbitrarily.

As the war wore on, however, the Japanese deviated from their regulations, using samurai swords to behead convicted flyers because ammunition was too scarce to waste on firing squads. Dozens of Americans were executed after summary hearings with no right of appeal.

Prosecuted by the U.S. after the war, Japanese officials said their harsh acts were dictated by military necessity.

Col. Hajime Onishi, charged with presiding over the execution of U.S. flyers in June, 1945, argued that "the indiscriminate bombings had killed 20,000 people and wounded 30,000 in his territory, most of whom were noncombatants, and, therefore, the thought of the disposition of 27 airmen was a small incident compared with these facts," records say. "The criminal code and international law

were secondary matters when compared with military operations of the supreme command."

Defense lawyers argued that offering full-blown trials for American flyers was impossible in the war's waning months, as Japan suffered under relentless U.S. attacks. Besides, such procedures "would not have given the crew members any greater rights or protections than they received under the abridged procedure, and that it constituted a trial under international law." In any event, defense lawyers argued, the "crew members had no rights as they were not prisoners of war."

Perhaps surprisingly, U.S. Army reviewers concluded in 1949 that "a Japanese tribunal could have reasonably found there was indiscriminate bombing" and that "in the course of a legal trial might well have found the [American] crew members guilty." Moreover, they acknowledged that Japanese legal procedures, although based on inquisitorial judges rather than the adversarial system used in the U.S., cannot be considered "automatically illegal."

But the abridged procedures employed as the war wore down violated the flyers rights, the U.S. found. "These men were not informed they were being charged with indiscriminate bombing and, except in the intelligence investigation, where they might reasonably be expected to give as little information as possible, they were not given a chance to make a statement." The flyers weren't permitted to attend the hearings where they were convicted and sentenced, the Army reviewers found.

Col. Onishi was sentenced to life at hard labor, although, on review, the sentence was recommended for reduction to 30 years.

Advocates for the Guantanamo prisoners acknowledge that procedures the Japanese used against American flyers were far less fair than the Bush administration has issued for its current trials of enemy prisoners. But they argue that the point of U.S. trials of the Japanese was that enemy prisoners can't be tried according to lower standards of fairness than America's own soldiers are entitled to.

Lt. Cmdr. Charles Swift, a Navy lawyer assigned to defend Mr. Hamdan, says the U.S. is railroading his client the same way the Japanese unfairly prosecuted Americans during

World War II. "One cannot help but be struck by the insincerity of a prosecution that purports to enforce the law of war by violating it," he says.

A Pentagon spokesman, Air Force Maj. Michael Shavers, declined to comment on the World War II precedents, but said the new military commissions established by President Bush "provide a valid, more flexible way in which to hold those who violate international laws of war accountable while providing them their day in court and preserving national security."

Jess Bravin, *What War Captives Faced In Japanese Prison Camps, And How U.S. Responded*, Wall St. J. Online, April 7, 2005

After his B-24 Liberator crashed into the Pacific Ocean in May 1943, U.S. Army Capt. Louis Zamperini spent 47 days on a life raft before being rescued by a Japanese patrol boat. Then his ordeal really began.

Shipped through a succession of prison camps, he finally arrived at Japan's secret Ofuna interrogation center. There, prisoners thought to hold critical intelligence were placed under a strict regimen designed to make them break. Solitary confinement, blindfolding and compulsory calisthenics were routine. Prisoners were shaved and stripped, forbidden from speaking to each other and made to stand at attention or assume uncomfortable positions for interrogations. Cooperate, and treatment might improve. Violate the rules and you might be slapped or beaten -- or worse.

"There was no such thing as international law, just Japanese law," says Mr. Zamperini, now 88 years old. Japan had never ratified the Geneva Conventions, and Ofuna inmates were told they had no treaty protections -- such as the right to reveal nothing but name, rank and serial number.

Upon Tokyo's surrender, however, the U.S. declared that international law did apply -- and held accountable much of the Japanese hierarchy, from prison guards to cabinet ministers. U.S. military prosecutors brought hundreds of cases for mistreatment of captured Americans, failure to classify them as prisoners of war and hiding them from delegations of the International Committee of the Red Cross.

Offenses as minor as failing to post camp rules or holding up a prisoner's meal were considered war crimes. A single count could bring a year at hard labor.

"The defendants in these cases, as you would expect in most contexts of war, believed that the circumstances justified what they were doing," says Prof. David Cohen of the University of California, Berkeley, who has been collecting trial records from around the world for a War Crimes Studies Center he founded in 2000.

Summary Executions

Although Nuremberg and other postwar tribunals largely are remembered for prosecuting the Nazi leadership for crimes against humanity, the trials originated in the mistreatment of prisoners of war. It was the German practice of summarily executing downed Allied flyers that in 1944 led Washington to begin planning for war-crimes prosecutions.

Other than the flyers, Prof. Cohen says, American and British soldiers captured by the Germans usually received adequate treatment. (Russian POWs fared far worse, under Nazi racial policies that considered Slavs subhuman.)

Prisoners of the Japanese, however, faced grueling treatment across the board. Forced labor, meager rations and poor medical care were the rule, along with occasional beheadings by samurai sword and even incidents of cannibalism.

But as the U.S. saw it, mistreatment didn't have to rise to the level of torture to merit punishment. For conditions that fell short of torture, prosecutors brought charges under the sweeping Geneva provision that barred "any unpleasant or disadvantageous treatment of any kind."

Along with routine beatings, Japanese interrogators had used solitary confinement, sleep deprivation, blindfolding, head shaving, restricting meals, uncomfortable positions and other techniques to make prisoners talk. Japan failed to register some prisoners or facilities with the Red Cross, delayed delivering their mail or Red Cross packages and denied some Americans POW privileges without full-blown judicial proceedings.

Japanese regulations required that prisoners of war "be humanely treated and in no case shall any insult or maltreatment be inflicted." In a February 1942 diplomatic note, Tokyo told Washington that while Japan held "no

obligations" under the Geneva Conventions, it nevertheless intended to apply "corresponding similar stipulations of the treaty" to captured Americans. When complaints arrived from the foreign governments or the Red Cross, which then as now was the only independent group allowed to visit prisoners, officials forwarded them to military authorities.

Soda Pop and a Biscuit

Mr. Zamperini, who still lives in his hometown of Los Angeles, says his first encounters with Japanese interrogators were hardly pleasant, but to his surprise, "they didn't beat you to get information out of you" -- at least not always.

After subsisting on a diet of plain rice, Mr. Zamperini was led before "naval officers in white suits with gold braid" who sat feasting at "a table full of goodies." Refuse to answer and they sent "you back to your cell more miserable than when you started." To get some of the food, Mr. Zamperini says he used a ruse, pretending to crack under pressure and then offering misleading information about the location of U.S. airstrips. "I got a soda pop and I got a biscuit, so I won," he says.

U.S. military commissions classified practices like these as war crimes. "Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty is forbidden," an Army judge advocate explained.

Government-appointed defense attorneys protested the vagueness of some charges. Threatening prisoners with "unpleasant or disadvantageous treatment ... does not constitute any war crime," one argued. "It does not allege any specific act." The attorney recalled his own World War I experience as a U.S. interrogator. "We tried by all manner of words and all manner of inducements -- I will not go beyond that -- to attempt to glean information which would be helpful in our operations against the enemy," he said, and no one considered it a war crime.

"We looked this up very carefully," the prosecutor replied. "When you start to threaten a man, of course you violate the provisions of the Rules of Land Warfare." The commission ruled for the prosecution.

The World War II defendants insisted that they hadn't received proper training, or that prisoners exaggerated their mistreatment, or that any problems resulted from cultural

misunderstandings or were appropriate punishment for breaking camp rules. Low-ranking guards claimed they were following superior orders, while top officers and cabinet ministers blamed rogue subordinates. Defense lawyers argued that Japan wasn't legally bound by the Geneva Conventions and, even if it were, many prisoners, such as Allied flyers, had no right to treaty protections because they committed such war crimes as sabotage or "indiscriminate bombing" of cities.

Hundreds of Trials

While the international tribunals at Tokyo and Nuremberg focused on a handful of high-ranking Axis defendants, hundreds of lower-profile national military commissions tried the small fry. For instance, in November 1945, a British military court at Wuppertal, Germany, sentenced three German officers to terms of up to five years for crimes at a Luftwaffe interrogation center. The central offense: "excessive heating of the prisoners' cells ... for the deliberate purpose of obtaining from the prisoners of war information of a kind which under the Geneva Convention they were not bound to give," according to the summary published in 1948 by the United Nations War Crimes Commission.

At Yokohama, Japan, meanwhile, the U.S. Army conducted more than 300 war-crimes trials through 1948. More than 90% involved prisoner mistreatment, says Berkeley's Prof. Cohen. American prosecutors focused on Ofuna, a secret interrogation camp run by the Imperial Navy for pilots and other high value prisoners, including Col. Gregory "Pappy" Boyington, the Marine Corps flying ace. Using affidavits and testimony from former prisoners, prosecutors depicted a grim world where men were broken through physical and psychological cruelty.

When Japan failed to cooperate with the Red Cross, the U.S. considered it a war crime. Lt. Gen. Hiroshi Tamura, head of prisoner management, was sentenced to eight years hard labor for, in part, "refusing and failing to grant permission" to the Red Cross to visit prison camps, denying Red Cross delegates "access to all premises" where prisoners were held and refusing to let prisoners speak to the Red Cross without Japanese observers present.

Japanese authorities told Ofuna prisoners that they weren't POWs but unarmed "belligerents" who weren't entitled to Geneva's protections. Navy aviator James Balch testified that an interrogator "explained to me that I wasn't a registered prisoner of war, that I was a special prisoner of the Greater East Asia Co-Prosperity Sphere and was, as far as the Japanese were concerned, still a combatant."

Lawyers for the Japanese defendants argued that since some captured Americans "lost the status of POWs in that they were saboteurs," it was no war crime to withhold POW privileges from them, Army records say. A military commission rejected that argument as "untenable" because "there is no evidence of any judicial proceedings against the ... victims for the alleged acts of sabotage by which they would be deprived of their status" as POWs.

The 'Ofuna Crouch'

Japanese interrogators put captured Americans in painful contortions for periods of 30 minutes to several hours. One hated position, the so-called Ofuna crouch, involved "standing on the ball of your foot, knees half bent and arms extended over the head," Navy Lt. Cmdr. John Fitzgerald said in a deposition.

In an affidavit, Navy Capt. Arthur Maher recounted his treatment after his ship, the USS Houston, was sunk in February 1942 off Indonesia. Captured after swimming to Java, Capt. Maher said Japanese officers "promised that we would be treated in accordance with international law."

Upon reaching Ofuna, things were different. "As we entered the camp gates, the utter stillness was noticeable." The Americans were told not to speak, locked in nine-by-six-foot cells and put to a stultifying routine of closely timed meals, exhausting calisthenics and limited chances to wash up. Prisoners were given just one cigarette a day and had to smoke it immediately, Capt. Maher said. Many of the guards, he said, "were sadists, some obviously cowards who did not wish to see battle," he said. "A few were definitely decent and tried to alleviate our condition."

During interrogations, "prisoners were required to sit at rigid attention and were never allowed to relax," Capt. Maher said. "At times, a cigarette would be offered in an attempt to throw you off guard. Interrogators used different tactics to obtain results. Some tried flattery, cajolery and

sympathy; others used threats of violence. But the prisoner was never allowed to forget that he was in a subservient position and there was nothing that he could do about it," he said.

Mail between prisoners and their families was restricted to a trickle of censored letters, Capt. Maher said. "This flagrant violation of international law caused great anxiety on the parts of the relatives of all prisoners in Ofuna. The Japanese frequently referred to the fact that we could write as soon as we left Ofuna, using that as an added incentive to talk and be rewarded by being sent to a regular prisoner-of-war camp."

At trial, Japanese officials insisted they had done nothing wrong. The chief of naval intelligence, Rear Adm. Kaoru Takeuchi testified that he had ordered that prisoners be treated well.

"I had a pamphlet named 'How to Interrogate Prisoners of War' compiled," he said. "The main points in the book" were "to respect international law. Not to mistreat prisoners of war. And to conduct the interrogation in a free, conversational manner." To make sure staff got the message, he had these passages "printed in gothic letters and underlined it with a black line," he said. Moreover, abusing the prisoners was ineffective. "Since Anglo-Saxons would not betray their countries, it would be no use to force them to talk," the admiral testified.

Officers were held liable for their subordinates' mistreatment of prisoners -- even if they tried to stop the abuse. Camp commander Suichi Takata "took immediate action and investigated all complaints made by the POW officers as to abuses committed upon POWs, reprimanding the guilty," and also "tried to correct the food situation and living conditions in the camp," concluded Army reviewer George Taylor. Two former prisoners -- the senior American and British officers held there -- wrote letters recommending clemency. In view of such "mitigating circumstances," Mr. Taylor recommended that Mr. Takata's punishment be reduced -- to 15 years at hard labor, from the original sentence of 40 years.

Half the time, Army reviewers found the commissions too lenient and recommended that harsher sentences be imposed. On occasion, though, they accepted

defense arguments. Prison guard Masatomo Kikuchi was convicted of compelling prisoners "to practice saluting and other forms of arduous military exercises on their rest days and at other times when they were tired." The reviewer concluded that "drilling a detail of men for 15 or 30 minutes ... is so universally utilized in the armies of the world to teach discipline and for exercise that it would be unjust and unreasonable to consider it a war crime."

'No Serious Injury'

Moreover, the reviewer found that the commission had overreached in convicting Mr. Kikuchi of two "beatings." In fact, testimony showed "that the mistreatment consisted of a series of slappings." Since "no serious injury was sustained by any of the POWs as a result of his mistreatment," Mr. Kikuchi's sentence was cut to eight years hard labor, from 12.

Cmdr. Sashizo Yokura, an Ofuna interrogator, testified that he opposed beating American prisoners, even though beatings commonly were used to discipline Japanese soldiers. He said he had learned from an interpreter who studied in the U.S. that, while "the Japanese think that beating is the simplest punishment when someone violates a regulation, ... the Americans consider beatings as the greatest humiliation." Moreover, he said, beatings were counterproductive, as prisoners wasted interrogators' time bemoaning their treatment.

Prosecutors, however, contended that Cmdr. Yokura had subtly signaled guards to soften up prisoners for interrogation. Specifically, they introduced evidence that in December 1944, Cmdr. Yokura delayed the meal of a captured B-29 flyer, Maj. H.A. Walker, and forced him to perform kampan soji, an awkward floor-cleaning exercise using a no-handle mop that typically was used to discipline Japanese sailors. These acts, prosecutors argued, contributed to Maj. Walker's "death by inches" nine months later, after he had been severely beaten by guards and denied medical attention.

Cmdr. Yokura's defense attorney, Michael Braun, challenged this theory in his closing argument. "We all regret the death of Maj. Walker, just as we regret the deaths of 250,000 to 300,000 other Americans who died in the past war," he said. "But the fact that a man died in a Japanese

prisoner-of-war camp does not automatically mean that any Japanese brought to trial theoretically for his death is guilty of it." Cmdr. Yokura denied holding up Maj. Walker's meal, but even if he had, Mr. Braun argued, he would have been justified because Maj. Walker refused to give his name, rank and serial number, as required by the Geneva Conventions. The U.S. Army's own Rules of Land Warfare authorized "food restrictions as punishment," he observed.

Mr. Braun urged the military commission not to apply a double standard. "The eyes of the world are focused on what America does here," and "whatever we do is going to be carefully read, carefully scanned, carefully measured against the principles we enunciate."

The commission sentenced Cmdr. Yokura to 25 years at hard labor.

Post-War Lessons

In 1949, the lessons of World War II trials were incorporated into international law. But following Sept. 11, 2001, Bush administration lawyers reexamined the degree of force and cruelty that could be used to interrogate prisoners captured in the war against terrorism. An April 2003 interrogation policy approved by Defense Secretary Donald Rumsfeld listed permissible methods including 20-hour interrogations, "dietary manipulation," "isolation," "sleep deprivation," "face slap/stomach slap," and "prolonged standing."

Mr. Zamperini, the former Japanese prisoner, says that in today's war on terrorism, severe treatment of the enemy might be called for.

"You've got a bunch of religious cutthroats that don't follow rules and regulations," he says, and "if it's a question of saving a lot of lives, then torture would be in keeping" with the country's best interest. "This is a whole new ballgame," he says.

APPENDIX J

NEIL A. LEWIS, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1

As the Pentagon was making its final preparations to begin war crimes trials against four detainees at Guantánamo Bay, Cuba, two senior prosecutors complained in confidential messages last year that the trial system had been secretly arranged to improve the chance of conviction and to deprive defendants of material that could prove their innocence.

The electronic messages, obtained by The New York Times, reveal a bitter dispute within the military legal community over the fairness of the system at a time when the Bush administration and the Pentagon were eager to have the military commissions, the first for the United States since the aftermath of World War II, be seen as just at home and abroad.

During the same time period, military defense lawyers were publicly criticizing the system, but senior officials dismissed their complaints and said they were contrived as part of the efforts to help their clients.

The defense lawyers' complaints and those of outside groups like the American Bar Association were, it is now clear, simultaneously being echoed in confidential messages by the two high-ranking prosecutors whose cases would, if anything, benefit from any slanting of the process.

In a separate e-mail message, the chief prosecutor flatly rejected the accusations by his subordinates. And a military review supported him.

Among the striking statements in the prosecutors' messages was an assertion by one that the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants would be "handpicked" to ensure that all would be convicted.

The same officer, Capt. John Carr of the Air Force, also said in his message that he had been told that any exculpatory evidence - information that could help the detainees mount a defense in their cases - would probably exist only in the 10 percent of documents being withheld by the Central Intelligence Agency for security reasons.

Captain Carr's e-mail message also said that some evidence that at least one of the four defendants had been brutalized had been lost and that other evidence on the same issue had been withheld. The March 15, 2004, message was addressed to Col. Frederick L. Borch, the chief prosecutor who was the object of much of Captain Carr's criticism.

The second officer, Maj. Robert Preston, also of the Air Force, said in a March 11, 2004, message to another senior officer in the prosecutor's office that he could not in good conscience write a legal motion saying the proceedings would be "full and fair" when he knew they would not.

Brig. Gen. Thomas L. Hemingway of the Air Force, a senior adviser to the office running the war crimes trials who provided a response from the Defense Department, said that the e-mail messages had prompted a formal investigation by the Pentagon's inspector general that found no evidence to support the two officers' accusations of legal or ethical problems.

Colonel Borch, who has since retired from the military, sent his own e-mail message to Captain Carr and Major Preston on March 15, 2004, with copies to several other members of the prosecution team the same day, outlining his response.

In his message, Colonel Borch said he had great respect and admiration for Captain Carr and Major Preston. But their accusations, he said, were "monstrous lies." He did not, however, address any specifics, like stacking the panel.

"I am convinced to the depth of my soul that all of us on the prosecution team are truly dedicated to the mission of the office of military commissions," he wrote, "and that no one on the team has anything but the highest ethical principles."

Colonel Borch did not respond to telephone messages left at his home. Captain Carr, who has since been promoted to major, declined to comment when reached by telephone, as did Major Preston. Both Captain Carr and Major Preston left the prosecution team within weeks of their e-mail messages and remain on active duty.

General Hemingway said the assertions in the e-mail messages had been "taken very seriously and an investigation was conducted because of the allegations about potential violations of ethics and the law."

He said in an interview that the Defense Department's inspector general spent about two months investigating the accusations and reviewing the operations of the prosecutor's office. "It disclosed no evidence of any criminal misconduct, no evidence of any ethical violations, and no disciplinary action was taken against anybody," the general said. He also said that no evidence had been "tampered with, falsified or hidden."

General Hemingway declined to discuss any specifics of the two prosecutors' accusations, but he said he now believed that the problems underlying the complaints were "miscommunication, misunderstanding and personality conflicts." The inspector general's report has not been made public but was sent to the Pentagon's top civilian lawyer, he said.

Copies of the e-mail messages were provided to The Times by members of the armed forces who are critics of the military commission process. The documents' authenticity was independently confirmed by other military officials.

The Bush administration and the Pentagon have faced criticism about the legitimacy of the military commission procedures almost since the regulations describing them were announced in 2002.

The rules, which in essence constitute a new body of law distinct from military and civilian law, allow, for example, witnesses to testify anonymously for the prosecution. Also, any information may be admitted into evidence if the presiding officer judges it to be "probative to a reasonable person," a new standard far more favorable to the prosecution than anything in civilian law or military law. It is unclear whether information that may have been obtained under coercion or torture can be admissible.

The trials of the first four defendants began last August in a secure courtroom in a converted dental clinic at the naval base at Guantánamo. Before they could start in earnest, the trials were abruptly halted in November when a federal judge ruled they violated both military law and the United States' obligations to comply with the Geneva Conventions.

But a three-judge appeals court panel that included Judge John G. Roberts, President Bush's Supreme Court nominee, unanimously reversed that ruling on July 15.

Defense Department officials have said they plan to resume the trials in the next several weeks. They said they also planned soon to charge an additional eight detainees with war crimes.

The two trials expected to resume shortly are those of Salim Ahmed Hamdan, a Yemeni who was a driver in Afghanistan for Osama bin Laden; and David Hicks, an Australian who was captured in Afghanistan, where, prosecutors say, he had gone to fight for the Taliban government.

In his March 2004 message, Captain Carr told Colonel Borch that "you have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and we only needed to worry about building a record for the review panel" and academicians who would pore over the record in years to come.

Captain Carr said in the message that the problems could not be dismissed as personality differences, as some had tried to depict them, but "may constitute dereliction of duty, false official statements or other criminal conduct."

He added that "the evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of the accused or the sustainability of our efforts." The office, he said, was poised to "prosecute fairly low-level accused in a process that appears to be rigged."

He said that Colonel Borch also said that he was close to Maj. Gen. John D. Altenburg Jr., the retired officer who is in overall charge of the war crimes commissions, and that this would favor the prosecution.

General Altenburg selected the commission members, including the presiding officer, Col. Peter S. Brownback III, a longtime close friend of his. Defense lawyers objected to the presence of Colonel Brownback and some other officers, saying they had serious conflicts of interest. General Altenburg removed some of the other officers but allowed Colonel Brownback to remain.

In his electronic message, Captain Carr said the prosecution team had falsely stated to superiors that it had no evidence of torture of Ali Hamza Ahmed Sulayman al-Bahlul of Yemen. In addition, Captain Carr said the prosecution

team had lost an F.B.I. document detailing an interview in which the detainee claimed he had been tortured and abused. Major Preston, in his e-mail message of March 11, 2004, said that pressing ahead with the trials would be "a severe threat to the reputation of the military justice system and even a fraud on the American people."

Third Guantanamo prosecutor quits, The Age (Australia), August 3, 2005

A third US military prosecutor has quit the military commission process under which Australian David Hicks will be tried, over concerns it is unfair.

US Air Force Captain Carrie Wolf has chosen to take a reassignment along with other prosecutors, ABC radio reports.

The news follows the release of emails by two former prosecutors who say the Guantanamo prosecutions are rigged to ensure guilty verdicts against mainly low-level suspects.

Foreign Minister Alexander Downer says Australia had asked for an explanation of the criticisms in the emails and been told the matter had been investigated and the commission process cleared.

As Hicks' trial on terrorism charges looms, Attorney-General Philip Ruddock says US prosecutors will produce witnesses to testify against the Adelaide man who has been detained at Guantanamo Bay for nearly four years.

The Government maintains that the commissions are the only way to try Hicks, because he cannot be charged under Australian law.

That view has been challenged by two Australian academics in legal opinions sought by entrepreneur Dick Smith.

And a British lawyer who represented three UK terror suspects who were later released, has urged Australians to pressure the Government into demanding Hicks' return.

Prosecutor quits

The ABC said Captain Carrie Wolf asked to leave the Office of Military Commissions at the same time as the two email authors, Major Robert Preston and Captain John Carr.

It was understood Captain Wolf had shared her colleagues' concerns about the military commission process.

Major Preston and Captain Carr said in their leaked memos that the evidence gathered against four detainees, including Hicks, was "half-assed".

The emails have prompted criticisms from the Law Council of Australia, the federal Opposition, and the Australian defence Forces' to lawyer, Captain Paul Willee, who said if the allegations were true, the process was a "charade".

'This isn't good enough'

A British lawyer who represented three Britons detained at Guantanamo - who were later released - says the military commissions were totally illegal under international law.

Louise Christian said the three British detainees were released after the British Government lobbied the US, and all other detainees had since been repatriated.

She said the UK Attorney-General had concluded there was no way they could receive a fair trial under the military commission process.

"It is no good for governments to sit back and say that it's in any way acceptable that their citizens fall down a legal black hole and are subjected to a wholly unfair trial. It just isn't on," she told ABC radio.

"The Australian citizens need to say to the Australian Government, this isn't good enough and you need to give your citizens the same protection that the British Government has given to its citizens."

"Until somebody is put on a fair trial, you can't know they are guilty of anything."

Ms Christian said she presumed the former British detainees remained under surveillance.

"If there is a problem then the authorities are going to know. But there's been no problem. None of them have been arrested. There's been no difficulties," she said.

Ambassador's assurance

Mr Downer said Australia's new Ambassador to the US, Dennis Richardson, had spoken to the Pentagon and been told by the head of the military commissions that the allegations had been investigated.

"There was a very thorough investigation into these allegations because amongst the material in these emails are very serious allegations," Mr Downer told ABC radio.

"The Americans have told us that those investigations cleared the military commission process." he said.